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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM R. GLENDON
(Counsel of Record)

JAMES B. WEIDNER
JAMES W. PAUL

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

QUESTIONS PRESENTED

Petitioners are independent insurers which provide annuity contracts to employees of colleges and universities through insured pension plans. Each such annuity contract provides that lifetime benefits will be based upon mortality tables which reflect the conceded fact that women as a group will live longer than a group of similarly situated men. As a result, while contributions to such annuity contracts are equal, under certain payment options women will receive benefits that are lower periodically (though equal in value) to benefits received by similarly situated men. The questions presented are:

1. Whether an insurer's provision of lifetime pension plan benefits which accords similarly situated male and female annuitants equal value for each dollar contributed based upon their expected longevity discriminates on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.* (1976 & Supp. IV 1980)).

2. Whether Title VII applies to the activities of third-party insurers when such insurers have no employer-employee relationship with their annuitants and the annuitants' employer has no control over the insurers' use of mortality tables.

3. Whether the protection from unintended federal intervention into the "business of insurance" provided by the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.* (1976)) here exempts TIAA and CREF (and thus the colleges and universities) from Title VII application.

4. Whether the use of sex-distinct mortality tables by petitioner-insurers constitutes discriminatory treatment of women under Title VII in the absence of any proof of discriminatory intent or pretext.

5. Whether an order requiring periodic annuity benefits to be made equal as between similarly situated men and women retiring after May 1, 1980, grants impermissible retroactive relief when such equalization is to be accomplished through a reduction in men's benefits derived from contributions made in the past.

PARTIES TO THE PROCEEDING

In addition to the petitioners* and respondents listed in the caption, the following are also respondents herein: Long Island University; Albert B. Lewis in his capacity as Superintendent of Insurance of the State of New York; the Equal Employment Opportunity Commission (intervenor); and American Association of University Professors (intervenor).

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* Pursuant to Rule 28.1 of this Court, petitioners state as follows: (1) *Parents.* All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates.* TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

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DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 29, 1982. For the reasons assigned herein (pp. 11-13, infra) should certiorari be granted, petitioners respectfully request that this case be set for argument on the same date as argument is heard in *Arizona Governing Committee* v. *Norris*, *cert. granted*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), and that an expedited briefing schedule be adopted, if necessary.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 29 Fair Empl. Prac. Cas. (BNA) 1599 and 30 Empl. Prac. Dec. (CCH) ¶ 33,072, appears in the separately bound Appendix filed with the Petition.[1] In addition to its Judgment, the District Court issued five opinions in this case (all of which appear in the Appendix): (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (on limited remand; reported at 93 F.R.D. 627).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was filed on September 29, 1982. This Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Involved herein are:

(1) Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1976)) which in pertinent part provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

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1 Citations herein to material printed in the Appendix appear as "__a."

> individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

(2) Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1976), which in pertinent part provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The full text of these provisions, and other relevant portions of Title VII, the McCarran-Ferguson Act, and the Portal-to-Portal Act (29 U.S.C. § 259 (1976)), are set out in full in the Appendix.

STATEMENT OF THE CASE

A. Description of the Parties and the TIAA-CREF Annuity System[2]

Petitioners TIAA and CREF provide a variety of insurance products, principally annuities, for employees of educational and research institutions through insured pension plans. TIAA is a non-profit legal reserve life insurance and annuity company organized under New York law in 1918, and offers fixed dollar annuities. CREF is a not-for-profit corporation created in 1952 by a special act of the New York legislature as a companion organiza-

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2 The facts were either largely stipulated to or were contained in uncontested affidavits filed by TIAA-CREF. Citations herein to material contained in the Joint Appendix filed below appear as "JA__."

tion to TIAA, to offer variable annuities. 3-5a. Both TIAA and CREF are closely regulated by the New York State Insurance Department and subject to the New York Insurance Law. JA185.

Respondent Diana Spirt is a tenured professor at Long Island University ("LIU"). Tenured LIU faculty are required to participate in the University's retirement plan which is funded by contributions made, by and on behalf of such faculty, to TIAA and CREF annuity contracts. 3-4a. Those contributions are equal for all similarly situated men and women, and result in equal accumulations at retirement. JA175.

The annuity contracts involved are between each individual participant and TIAA-CREF, not with the employer LIU. JA174. Neither LIU nor any other participating institution has authority or control over the terms of the TIAA-CREF contracts or over TIAA-CREF's mortality tables or rate schedules, which are submitted to, and have received the approval of, the New York State Superintendent of Insurance. JA174, 180-83. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. All contributions are immediately vested and credited, as received, to individual accounts established for each employee by TIAA-CREF, and from which benefits are ultimately paid. JA175. Employees retain those benefits wherever they may transfer employment, in or out of higher education. 4a.

B. Annuity Principles

In order to determine the periodic fixed amount of annuity payment from TIAA and the periodic fixed number of annuity units from CREF, payable for as long

as an annuitant may live, TIAA-CREF, like any insurer, must be able to determine in advance the period over which benefits are expected to be paid. JA372. Although no one can determine in advance how long any individual will live, an insurer (through the use of a mortality table) can predict how many deaths will occur each year within a large group of persons presenting similar risk characteristics, and thus can obligate itself to provide lifetime benefits to each individual in that group.

In order that annuitants may receive in benefits the full (*i.e.*, equitable) value of premiums paid, and the earnings thereon, in light of the risks they present, the insurer engages in a process known as risk classification whereby persons are grouped according to the degree of risk (here, anticipated longevity) presented. JA372-73, 315-18. Each person within the group so established pays the same premium and is entitled to benefits of the same value. JA179-80. The only stable, significant and objectively measurable risk classification factors for annuitant longevity are age and sex. As do all companies issuing annuities, TIAA-CREF rely on these two factors. JA377-78, 713-15.

TIAA-CREF's studies of its own annuitants' lives, and every other similar study known to them, show that at every age, the male mortality rate is greater than the female mortality rate. JA180-82. Because the group of women live more years than similarly situated men, given equal accumulations at retirement, lifetime annuity benefits must be paid at a lower periodic rate to the women in order to avoid exhausting the funds accumulated by and for them while many of them are still living. JA360-63.

C. Proceedings Below

Plaintiff brought this action in 1974 alleging that TIAA-CREF's use of sex-distinct mortality tables violated, *inter alia,* Title VII and 42 U.S.C. §§ 1981 *et seq.* JA14. The jurisdiction of the district court was invoked under Title VII, as amended (42 U.S.C. §§ 2000e *et seq.*), the Civil Rights Act of 1870 (42 U.S.C. §§ 1981 *et seq.*), The Fair Labor Standards Act, as amended (29 U.S.C. § 206(d)), and under 28 U.S.C. §§ 1331 and 1343. (*Id.*)

In an opinion dated August 9, 1979, the district court granted summary judgment in favor of TIAA on the ground that the McCarran-Ferguson Act prevented the application of Title VII to that insurer. 53a. Holding that CREF is not engaged in the "business of insurance" within the meaning of that Act, the court applied Title VII to CREF and found that its use of sex-distinct mortality tables violated Title VII under the rationale of *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The court enjoined CREF, on and after May 1, 1980, from using sex-distinct mortality tables in calculating the benefits to which participants would be entitled at retirement. Finally, the court also enjoined LIU from contributing, or requiring its employees to contribute to, any retirement plan which used sex distinct mortality tables in the calculation of periodic benefits. All parties filed notices of appeal from this decision.

In February, 1981, Albert B. Lewis, Superintendent of Insurance of the State of New York, was made a supplemental defendant to this proceeding (then before the district court on limited remand) by reason of his rejection, as inconsistent with New York law, of a merged-gender, *i.e.*, "unisex," mortality table proposed for prospective use by TIAA-CREF. JA442. In an opinion dated March 19, 1982, the district court, *inter alia*, denied

TIAA-CREF's motion to amend the judgment and denied plaintiff's motion for summary judgment against defendant Lewis. 82a.

On September 29, 1982, the Court of Appeals affirmed the district court's holding as to CREF, but reversed the finding below that McCarran-Ferguson exempted TIAA from Title VII liability under *Manhart*. 1a. The Court also held that the required "equalization" in annuity benefits ordered by the district court was not impermissibly retroactive. Such equalization was endorsed even though it was to be accomplished, contrary to the express terms of the participants' annuity contracts, by ignoring sex as a risk classification factor and by reducing the benefits, resulting from contributions made in the past, to be received by males.

On October 14, 1982, the Sixth Circuit Court of Appeals found that TIAA-CREF's use of sex-distinct mortality tables did not violate Title VII in *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671.

REASONS FOR GRANTING THE WRIT

I. There Is A Direct Conflict Between The Circuits As To Whether TIAA-CREF's Use Of Sex-Distinct Mortality Tables Violates Title VII

Two circuits, in opinions hardly more than two weeks apart, have come to precisely opposite conclusions in deciding whether TIAA-CREF's use of sex-distinct mortality tables violates Title VII. Both decisions directly involve the same retirement system, the same use of actuarial tables, the same alleged form of discrimination, and both directly consider the same authority—this Court's decision in *Manhart*—but reach opposite conclu-

sions on the issue of discrimination. As a result of these two decisions, TIAA-CREF have been enjoined from continuing the challenged use of sex-distinct tables by one court, while such use has been unequivocally endorsed by another. In these circumstances, we submit, the Court should exercise its jurisdiction and grant a writ of certiorari to resolve this conflict. *Union Labor Life Insurance Co.* v. *Pireno*, 50 U.S.L.W. 4911, 4912 (U.S. June 28, 1982); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 (1981); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190-91 (1974).

The issue here presented is an important one for the entire insurance and pension industries. At stake is the right to recognize lower female mortality in setting insurance and annuity rates, a universal practice among insurers based upon sound actuarial and insurance principles. Also at issue is the question whether Title VII has given federal agencies, such as the EEOC, the right to substitute their judgment in matters of insurance practices for that of officials charged by the various states with the task of such regulation.

Prompt resolution of the present impasse presented by the conflict between the Second and Sixth Circuits is of vital importance to the TIAA-CREF nationwide retirement system. TIAA-CREF is one of the ten largest insurers in the United States with assets exceeding $20 billion. Although organized in and subject (*inter alia*) to the laws of the State of New York, TIAA-CREF provide annuity contracts to employees of institutions of higher education in every state in the Union. One of the characteristics of this annuity system, and indeed one of its most often cited advantages, is its uniformity. The same basic contractual provisions and actuarial practices govern the relationship between TIAA-CREF and its participants no

matter where those participants are employed. Thus, the present conflict poses grave uncertainty in all unretired participants' annuity contracts and benefits, and in the administration of each participating institution's retirement plan.

A. The Decision in Spirt

The Court of Appeals below found that TIAA-CREF's use of sex-distinct mortality tables in setting annuity benefit rates violated Title VII. Such use was found by the Court to be proscribed by *Manhart* and other decisions, including the district court's decision in *Peters* v. *Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979). The Court below rejected TIAA-CREF's articulated justification for its use of sex-distinct benefit rates rooted in fundamental actuarial and insurance principles.

The Court also rejected petitioner's claim that they were not here "employers" within the meaning of Title VII and thus, by definition, not subject to its provisions. It held rather that TIAA-CREF must be "deemed" to be an "employer" (1) by reason of its relationship to the colleges and universities it serves and (2) in order not to frustrate the effectiveness of Title VII. 14-15a. The district court decision in the *Peters* case was again cited with approval in reaching this result. 15a.

Finally, as noted, the Court ordered that all TIAA-CREF participants retiring on or after May 1, 1980 receive periodic benefits equal to those received by similarly situated members of the opposite sex, regardless of (1) the contrary terms of the annuity contracts or (2) the fact that contributions supporting those benefits were made in the past, often over the last four or five decades. 27a.

B. The Decision in Peters

On October 14, 1982, the Sixth Circuit Court of Appeals decided *Peters* v. *Wayne State University,* a class action brought by women employed by Wayne State University ("WSU") who claimed that TIAA-CREF's use of sex-distinct mortality tables to calculate annuity benefit rates violated Title VII. The district court, as noted, had found such use to be discriminatory based almost exclusively on its reading of the *Manhart* decision. The Sixth Circuit reversed.[3]

The Sixth Circuit found the district court's holding that TIAA-CREF were "employers" within the meaning of Title VII (based upon TIAA-CREF's "ties" with WSU and those insurers' specialized clientele) to be "clearly erroneous." 138-39a. The Court rejected (citing *Manhart*) the suggestion that WSU had delegated responsibility for any aspect of employee compensation to TIAA-CREF or, absent any evidence of control, that TIAA-CREF was the "agent" of WSU. 139a.

In contrast to the Second Circuit's holding as to LIU, the Court in *Peters* found that WSU had no Title VII liability simply for choosing TIAA-CREF contracts as a funding vehicle for its retirement plan:

> We hold . . . that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

140a.

In contrast to the Second Circuit, no discriminatory treatment of, or impact on, women was found in the use

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3 The Sixth Circuit's decision, not yet officially reported, is set out in the Appendix hereto.

of separate tables because "the tables are sex-segregated simply because women live longer than men." 141a. The Court distinguished the factual situation which existed in, and gave rise to, the *Manhart* decision and, citing with approval this Court's decisions in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), found (144a) that:

> Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.
>
> Common sense supports this holding.

C. The Importance of the Issue, The Relevance of *Norris*, and The Necessity for Clarification

A major purpose served by exercise of this Court's jurisdiction is the clarification of important previous decisions. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 569 (1978); *United States* v. *Gaddis*, 424 U.S. 544, 547 (1976). Here, the challenged use of sex-distinct mortality tables involves the application and scope of this Court's decision in *Manhart* and the proper interpretation of significant federal legislation and its effect on billions of dollars of retirement benefits for hundreds of thousands of people. The need for review of the Second Circuit's decision is compelling.

The importance of the issue is reflected in the fact that certiorari has recently been granted in *Arizona Governing Committee* v. *Norris* (No. 82-52). Although *Norris* and *Spirt* both involve the proper application of *Manhart*'s limited holding, *Norris'* chief concern is with the "open market" exception enunciated there. The "plans" at issue differ markedly—that in *Norris* is a completely voluntary

deferred compensation plan with a cash option, while that in *Spirt* is an insured pension plan requiring mandatory participation and providing lifetime annuity income but no cash option.

Spirt (and *Peters*[4]) present issues well beyond the narrower focus of *Norris*. The insurer's justification for the use of sex-distinct mortality tables is not involved in *Norris*. Independent insurers and the New York Superintendent of Insurance are parties in *Spirt*, and thus the operation of the McCarran-Ferguson Act, and Title VII's applicability outside the employer-employee context, are here squarely in issue though not in *Norris*. Similarly, the critical issue of the propriety of granting retroactive relief is raised in *Spirt*, but not in *Norris*.

Although a decision in *Norris* will undoubtedly involve clarification and application of *Manhart*, we do not believe that it could reasonably be expected to dispose of the significant and difficult issues not raised by *Norris* which are contained in *Spirt* or *Peters*. It is most important that this large insurance and annuity system, and the insurance and annuity industry generally, given conflicting instructions from two different circuits, be granted definitive guidance by this Court on the particular issues those conflicting decisions present. In reliance on *Manhart*, the Second Circuit has enjoined TIAA-CREF's use of sex-distinct mortality tables throughout the nation, including the Sixth Circuit, where such use is approved as consistent with *Manhart*. If full resolution of this conflict and full clarification of *Manhart* is to be achieved, we believe it appropriate that the issues in *Spirt* and *Peters* be briefed, argued and decided in the same context and not be left for later resolution in light of *Norris'* more limited

4 We understand that plaintiffs in *Peters* will shortly be filing a petition for certiorari to review the decision of the Sixth Circuit.

scope. To this end, we urge that certiorari be granted, and that the Court set argument in *Spirt* (and *Peters*) on the same date as argument is scheduled in *Norris*, pursuant to an expedited briefing schedule if necessary.

The significance of the issue is also evident from the large number of cases pending in the lower courts in which the issue of *Manhart*'s proper application has been raised and decided.[5] *See, e.g., Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 237 (1964). TIAA-CREF have themselves been named in some ten suits in various district courts, as well as in a number of federal and state administrative proceedings, all relating to the use of sex-distinct mortality tables.

Further, the inability of the Courts of Appeals to reach a common or consistent answer to the issues here presented, or to be able to apply the same authorities to achieve a common result, begs for the intervention of this

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5 In addition to *Spirt*, *Peters*, *Norris* and *EEOC* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978), the following cases have also applied *Manhart's* holdings: *Hannahs* v. *Teachers' Retirement Sys.*, 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981); *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981), *appeal pending*; *Women in City Gov't United* v. *City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Probe* v. *State Teachers' Retirement Sys. and Teachers' Retirement Bd.*, 27 Fair Empl. Prac. Cas. (BNA) 1306 (C.D. Cal. 1981), *appeal pending*; *Retired Public Employees' Ass'n of Cal.* v. *Cal.*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262); *Shaw* v. *Int'l Ass'n of Machinists & Aerospace Workers*, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980); *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979).

Court. In the *Colby* case, for example, the First Circuit's opinion was replete with questions the Court felt *Manhart* had not addressed. In foreseeing "difficulties, possibly very great difficulties, that did not arise in *Manhart*, in light of the Court's caveat that [Title VII] was not intended to revolutionize the industry" (589 F.2d at 1144), the Court commented (at 1143):

> Whether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were.

In *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), in addressing the "vexing" problems created by the presence of an independent insurer whose contracts provided for equal contributions but paid unequal periodic benefits to similarly situated men and women, the Court stated that "this [problem] results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company."

In *Hannahs* v. *Teachers' Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527, 534 (S.D.N.Y. 1981), the Court found that applying *Manhart's* admonition against retroactivity was "not an easy task." Judge Haight refused to grant relief on the record before him, seeing "inherent problems" in equalizing benefits for females by reducing males' benefits. In that regard he stated: "I am concerned that such an order would inequitably affect the male annuitants. . . ." *Id.*

A grant of certiorari to resolve the substantial questions left unanswered by *Manhart* is clearly indicated. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404 (1979).

II. Certiorari Should Be Granted Because The Court Of Appeals Herein Has Decided Important Questions Of Federal Law In Conflict With Applicable Decisions Of This Court

A. The Court of Appeals Decision Has Improperly Expanded the Holding of This Court in Manhart

The *Manhart* decision was deliberately narrow in scope and limited in application to the particular parties and pension plan before the Court: "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." (435 U.S. at 717). No private insurance company was involved in *Manhart* and particular care was taken to make it clear that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." *Id.* These caveats to any wholesale application of *Manhart's* teaching were, however, ignored by the Second Circuit in *Spirt*.

The TIAA-CREF system differs markedly from the employer-operated pension plan involved in *Manhart*. TIAA and CREF are independent insurers regulated by the State of New York. TIAA and CREF issue separate contracts to each individual participant and establish individual accounts for each participant for the receipt of contributions. Contributions by and on behalf of all similarly situated participants at each institution are equal.

Manhart, on the other hand, presented a totally different situation. There the pension plan was established and operated by an employer. The plan itself was a typical defined benefit plan with no individual accounts for

employees.[6] The wages of the women were lower than that of similarly situated men because the contributions required of the women (deducted from their paychecks) were 15% greater than those required of similarly situated men. To ignore these distinctions as the Second Circuit did below is to invite chaos in the insurance and pension industry, the "revolution" which *Manhart* expressly sought to avoid.

i. TIAA-CRFF are not employers within the meaning of Title VII.

TIAA and CREF, companies with hundreds of thousands of participants at colleges and universities throughout the nation, clearly represent "the insurance and pension industries" carved out in *Manhart* for different treatment than that received by the employer-operated plan at issue there. As independent insurers, TIAA-CREF do not employ their participants, nor do the participants' employers control the risk classification and rate making activities of TIAA-CREF. In specifying that its retirement plan would be funded through TIAA and CREF contracts, the employer, LIU, did not create an agency relationship between itself and TIAA-CREF, nor did it make a sham delegation of its pension responsibili-

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6 Retirement benefits in such plans (equal for similarly situated men and women) are computed, not from individually accumulated amounts, but pursuant to a formula which normally establishes benefits as a percentage of the employee's final average salary. The cost to the employer to provide such equal benefits at retirement is greater for women than for similarly situated men. Such "formula benefit" plans by definition avoid the question of inequity or subsidization that arises from treating different classes of risks the same. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

ties to "corporate shells." *Manhart*, 435 U.S. at 718n.33. In ignoring these distinctions the Court of Appeals has improperly expanded the scope of Title VII and disregarded *Manhart*'s clear statement that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Id.*

ii. The Court of Appeals improperly granted retroactive relief.

The Court of Appeals also disregarded *Manhart's* admonition against the imposition of retroactive relief. Rather the Court mandated that a portion of benefits resulting from males' vested past contributions, or earnings thereon, be taken from the men and given to the women in order to achieve an equalization of periodic benefits. The Court has, thus, "attach[ed] a new disability in respect to transactions * * * already past" through the reduction in value of each past contribution whenever made. *See Lohf* v. *Casey*, 330 F. Supp. 356, 359 (D. Colo. 1971), *aff'd*, 466 F.2d 618 (10th Cir. 1972).

In *Manhart* this Court refused to let stand an order which would have required the Department of Water & Power to return to the females any contributions they had paid in excess of those paid by similarly situated males. Here the Second Circuit found retroactive relief appropriate, *Manhart* notwithstanding, because (1) TIAA-CREF have supposedly been on notice as to the "questionability of the practices" since 1974, and (2) the relief granted in *Spirt* was not nearly so "drastic" as that at issue in *Manhart*, because the extra money to increase women's benefits would come from the males, not from TIAA-CREF reserves. 22-24a.

The Court below has read *Manhart*'s admonitions on retroactivity too narrowly. Being "on notice" of claims of discrimination can hardly constitute a basis for deciding that retroactive relief should be imposed. Moreover, the Court of Appeals decision would affect contributions made long before Title VII was enacted, or the use of sex-distinct tables was questioned. The TIAA contracts, the CREF certificates, and other materials provided throughout the years to TIAA-CREF participants, set forth those insurers' obligation to use sex and age as risk classification factors. JA501, 505, 513.

Far from being less "drastic" in its impact, the decision below would presently mandate the transfer in the TIAA-CREF system alone of some $2 billion in benefits from males to females over the course of the males' retired lives. *See* JA565. Discretionary investments by males in TIAA-CREF through voluntary contributions would also be subject to the operation of unisex tables under the Court of Appeals decision. All this would be achieved without the men being represented at any level of the proceedings below[7] and in the face of that Court's holding that "each employee has an immediate property interest in the benefits that accrue by virtue of the contributions made on the employee's behalf." 4a. Such a marked departure from the dictates of *Manhart*,[8] with the

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7 TIAA-CREF's motion to have men in its system joined as indispensable parties was denied by the district court. Although the issue was raised on appeal, it was not addressed by the Second Circuit.

8 Such an award also violates the "good faith reliance" provisions of Title VII (42 U.S.C. § 2000e-12(b) (1976)) and the Portal-to-Portal Act (29 U.S.C. § 259 (1976)), and the Title VII limitation on awards of back pay (42 U.S.C. § 2000e-5(g) (1976)).

consequences outlined above, merits review of the decision below. *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 219 (1967); *Wilson* v. *Schnettler*, 365 U.S. 381, 383 (1961).

B. The Court of Appeals Decision Has Redefined the Applicability of the McCarran-Ferguson Act

The Court of Appeals decision completely redefines and severely limits the scope of the McCarran-Ferguson Act. Although the Court undertook to decide whether Title VII "specifically relates" to the business of insurance (a criterion for McCarran application), it never did so. The Court rather decided (based largely on two recent district court decisions) that the phrase "[n]o Act of Congress" in the statute was "primarily" meant to apply to the federal antitrust laws and was not intended to include "subsequently enacted civil rights legislation." Such a wholesale revision of the plain words of the Act, given the obvious significance of the change to insurers and the states, can only be undertaken by Congress.

The Court's decision has substituted confusion where clarity formerly existed by entirely exempting from the Act's scope an ill-defined body of federal legislation. "No Act of Congress" has become "Some Acts of Congress," with an enormous potential impact on the insurance industry and state regulation of insurance. Insurers can no longer be confident that, once engaged in the business of insurance and acting in accord with state insurance law, they will not be subject, as well, to all varieties of federal legislation enacted since 1945 which might arguably apply to their insurance activities.

An example of the state-federal conflict which McCarran was meant to avoid is present here. The plaintiff and the EEOC have sued the New York Superintendent of Insurance because of his disapproval, as inconsistent with New York law, of a merged-gender mortality table proposed for prospective use by TIAA-CREF in 1981. The EEOC seeks to substitute its own views of the proper regulation of these insurers for that of the highest state official in New York specifically charged with that task under New York law. The interest of the states in the proper regulation of insurance, the expressed rationale for the Act (*see* 15 U.S.C. § 1011 (1976); 146a), is thus threatened.

The Court further held, exclusively on the basis of *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959), that CREF was not engaged in the "business of insurance" because its contracts did not subject it to "investment risk." This result was endorsed despite the fact that TIAA (whose annuities carry a guaranteed return and thus subject it to investment risk) and CREF share common management, engage in the same risk classification and risk spreading activities, and are both closely regulated by the State of New York.

The risk classification and risk spreading activities of CREF, moreover, clearly qualify it as being engaged in the "business of insurance" within the meaning of the Act in light of this Court's recent decisions in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Co.* v. *Pireno, supra*.

The interest of the states in the regulation of the business of insurance unfettered by unintended federal

intervention[9] would here be best served by application of the Act to CREF as well as TIAA. That interest, further, should extend to those who deal with insurers, such as LIU. To enjoin LIU, as the Court did below, from dealing with TIAA or CREF, when those companies, their activities and insurance products, are otherwise entitled to the Act's protection, is to permit indirect outside regulation of those insurers when the Act would forbid direct regulation. If the Act is to serve its stated function, those who deal with insurers under the Act should be free to purchase products offered by them which have been found to be non-discriminatory by the State.

C. The Court of Appeals Ignored Plaintiff's Failure to Demonstrate the Requisite Discriminatory Intent in This Disparate Treatment Case

The Second Circuit completely ignored the rule requiring that plaintiffs show proof of discriminatory intent in order to prevail in Title VII disparate treatment cases. *E.g., Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Indeed, the Court did not even mention the intent issue although it was squarely raised.

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9 The New York Superintendent of Insurance has termed the prospect that CREF would not be subject to the Act, but rather under the supervision of federal agencies with no insurance expertise such as the EEOC, an "intolerable" intrusion into that Department's ability to regulate insurers. (JA635). The same reasoning would, of course, apply to TIAA as well.

No showing of discriminatory intent has been made here. See JA179-80, 373. A similar result obtained in *Peters*, leading the Sixth Circuit to state (141-42a):

> Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way . . . . Wayne State has not violated Title VII according to a disparate treatment analysis.

CONCLUSION

For all the foregoing reasons, we urge that a writ of certiorari issue and the case be set down for argument on the same date as *Norris*, pursuant to an expedited briefing schedule if necessary.

Respectfully submitted,

WILLIAM R. GLENDON
(Counsel of Record)

JAMES B. WEIDNER
JAMES W. PAUL

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM R. GLENDON
(Counsel of Record)

JAMES B. WEIDNER
JAMES W. PAUL

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

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Opinion of the Court of Appeals

DIANA SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Cross-Appellants-Appellees.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,
Second Circuit

Argued June 18, 1982
Decided September 29, 1982

Before:

NEWMAN and PIERCE, *Circuit Judges,*
and CANNELLA, *Senior District Judge.**

* The Honorable John M. Cannella, Senior United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, granting and denying motions and cross-motions for summary judgment and to dismiss. The court below found that defendants Teachers Insurance And Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by calculating retirement benefits based on sex-distinct mortality tables, and granted judgment against CREF, while finding that TIAA was exempt from the mandate of Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

Affirmed in part; reversed in part, and remanded.

PIERCE, *Circuit Judge*:

It is plaintiff's claim, in this action which was filed in the United States District Court for the Southern District of New York more than eight years ago, that defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") have violated the equal employment provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), by using sex-based mortality tables to calculate the benefits to which pension plan participants, including plaintiff, are entitled upon retirement. As a result of the use of such tables female retirees, who made contributions equal to those of similarly-situated males, receive a smaller monthly retirement benefit than do such male retirees. The district judge found that defendants' use of sex-based mortality tables violated Title VII, and granted summary judgment on this issue. He went on to hold, however, that TIAA—but not CREF—was exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Therefore, the district court enjoined CREF—but not TIAA—from using sex-based mortality tables to calculate the number of annuity units to which a retiree is entitled upon retirement on or after May 1, 1980, and enjoined Long Island University ("LIU"), plaintiff's employer, from either making contributions on behalf of its employees, or requiring

its employees to contribute, to any retirement plan continuing to use sex-based mortality tables to calculate periodic benefits after June 1, 1980.

Plaintiff also claimed below that TIAA and CREF's methods of calculating retirement benefits violated the equal pay provisions of the Fair Labor Standards Act of 1964, 29 U.S.C. § 206(d), and infringed her right to equal protection of the laws in violation of 42 U.S.C. §§ 1983 and 1985. Finding no state action, the district judge granted defendants TIAA-CREF's motion for summary judgment on the §§ 1983 and 1985 claims. Plaintiff's equal pay claims apparently were not the subject of motions for summary judgment below, and were not dealt with by the district court.

Defendants TIAA-CREF and plaintiff have appealed virtually every final order of the district court pursuant to 28 U.S.C. § 1291.

We affirm in part and reverse in part.

I. *Facts*

Plaintiff Diana L. Spirt is a tenured professor at Long Island University. LIU has adopted a retirement program managed by TIAA and CREF for its tenured professors and certain other employees. Participation in this program is mandatory for most eligible employees, including plaintiff.

TIAA and CREF manage retirement plans for faculty and staff members at 85% of all private four-year colleges and universities and over 40% of all public colleges and universities in the United States. More than 400,000 employees at approximately 2800 colleges and universities participate in the TIAA-CREF system. TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. It is " 'an educational service organization [providing] insurance annuities especially designed for employees of educational institutions in the United States and Canada.' " *Peters v. Wayne State University,* 476 F. Supp. 1343, 1346 (E.D. Mich. 1979).

In 1952, TIAA's companion organization, CREF, was created in order to allow the investment of pension funds in

financial instruments other than those traditionally permissible for annuity funds like TIAA. It, like TIAA, is a non-profit corporation, created by special act of the New York State Legislature.

Under the LIU retirement plan the employee and the university each contributes 5% of the first $4800 of an employee's yearly earnings to the pension fund. In addition, LIU contributes 11% of all earnings in excess of $4800, while the employee contributes 5% of all such earnings. Employees may also make voluntary additional payments into their pension fund accounts, on either a regular or an occasional basis. After receipt by TIAA-CREF, all contributions, plus minimum interest and dividends thereon, are immediately credited to individual employees' accounts as they accumulate. Pursuant to contract, all accumulated benefits are fully vested and fully "portable" at all times. Thus each employee has an immediate property interest in the benefits that accrue by virtue of the contributions made on the employee's behalf. In addition, each employee retains this ownership right if and when that employee moves on to other employment, either inside or outside the field of higher education. If a plan participant moves to another university that has adopted a TIAA-CREF retirement program for its employees, the new employer will pay its own pension contributions and those which it withholds from the employee's salary into the employee's existing account. If a plan participant obtains employment in a different field or at a teaching institution that does not use TIAA-CREF to provide its retirement program, that participant can nevertheless make additional contributions to the TIAA-CREF account on either a regular or occasional basis. Even if the employee fails to make such contributions, the participant will retain the right to receive, upon retirement, the benefits to which the participant is entitled by virtue of the contributions that were accumulated on his or her behalf. If a plan participant dies before retirement, the funds accumulated in the account are paid to a designated beneficiary as a death benefit.

After retirement, TIAA provides a life-long fixed dollar annuity, which pays the retired plan participant a specified and

definite amount of benefit on a monthly basis.[1] CREF, on the other hand, provides its annuitants with a variable annuity. Under this plan the annuitant receives a periodic payment, the amount of which reflects the results of CREF's investment policies. Plan participants may allocate their contributions between TIAA and CREF in whatever proportions they choose, and under certain conditions, they may transfer contributions from one system to the other. Upon an employee's retirement, both the amount of the fixed benefit to be received monthly from TIAA and the amount of CREF units to be used in determining the amount of benefits to which an employee will be entitled each year under the CREF variable-annuity program are calculated, and the retiree's contract with TIAA-CREF is "settled."[2] This calculation of benefits is based in large part on life expectancy projections, which are determined, in turn, by use of sex-segregated mortality tables. Because women as a class live longer than men as a class, and women as a group are expected, as a result, to receive annuity payments over a longer period of time than similarly-situated men, the use of tables which reflect this male-female difference results in female retirees, who have made pension contributions that are equal to those made by similarly-situated men, receiving monthly payments that are smaller than those re-

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1 Although it is assumed that most TIAA-CREF participants will receive their retirement benefits on a monthly basis, an annuitant may choose to receive annuity payments quarterly, semi-annually, or annually, rather than monthly. JA 196. Also, rather than simply receiving benefit payments for the duration of one's own life (a single life annuity), a retiree can opt for a life annuity with a ten or twenty year guaranteed period, or for a joint-life option, under which benefits will continue throughout the lives of both the retiree and a named beneficiary. JA 383.

2 Under the TIAA-CREF system a retiree has no right to receive a lump sum payment for the full value of contributions paid into the fund. However, upon retirement a participant may choose to receive up to 10% of accumulated contributions for use in dealing with transitional costs. Receipt of such a payment results, of course, in a corresponding decrease in the amount of moneys available for annuity payments.

ceived by their male counterparts.[3] It is stipulated among the parties that "[c]ommencing at age 65, the amount of each periodic payment to male annuitants under the single life option is approximately 11.3% greater than the amount payable to female annuitants of the same age." JA 182. It is this result that is challenged as violative of Title VII.

II. *Procedural History*

Plaintiff initiated this action against TIAA and CREF by filing her complaint on April 15, 1974. On May 29, 1975, she moved for class certification and partial summary judgment. On August 20, 1975, defendants TIAA and CREF cross-moved for summary judgment and to dismiss the complaint pursuant to Rule 19, Fed.R.Civ.P., for failure to join the individual male annuitants in the TIAA-CREF system as indispensable parties to the litigation. On January 23, 1976, the motions for summary judgment were denied on the ground that there existed disputed issues of material fact. At that time decision on the other motions was postponed. On May 5, 1976, TIAA-CREF again moved for partial summary judgment on the ground that plaintiff had failed to properly file with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights the complaints that are jurisdictional prerequisites to suit in the federal district court under Title VII.[4] In addition, defendants moved to dismiss for failure to join plaintiff's employer, LIU, as an indispensable party. In an opinion dated July 1, 1976, the district judge denied defendants' motion for partial summary judgment, denied

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3 "Similarly-situated" individuals are those who are the same age, retire on the same date, and have identical amounts of accumulated contributions in their individual retirement accounts on the date of retirement.

4 We agree with the district judge that neither plaintiff's failure to file a complaint with the EEOC prior to initiating her suit in the district court, nor her alleged failure to pursue her state remedies, served to defeat the jurisdiction of the district court over this action. *See Egelston v. State Univ. College at Geneseo*, 535 F.2d 752, 754-55 (2d Cir. 1976).

plaintiff's motion for class certification, and denied defendants' Rule 19 motions except to the extent that plaintiff was directed to file an amended complaint joining LIU as a defendant in the action. After filing an amended complaint, plaintiff moved once again for summary judgment. Defendants TIAA and CREF again cross-moved for summary judgment. In their motions both parties relied heavily on a Stipulation of Facts dated April 21, 1977. On August 9, 1979, Judge Ward filed an opinion in which he found that TIAA-CREF's use of sex-based mortality tables violated Title VII of the Civil Rights Act of 1964. Therefore, the district judge granted summary judgment in plaintiff's favor against CREF and enjoined CREF from using sex-based mortality tables in calculating benefits to which retirees would become entitled upon retirement on and after May 1, 1980. However, because the district judge also found that TIAA was in the business of insurance, he granted summary judgment in favor of TIAA on the ground that it was exempted from the provisions of Title VII by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

Although the district judge entered no order directly against TIAA, he did enter an order enjoining LIU from making any contributions, and from requiring its employees to contribute, to any retirement plan that continued to use sex-distinct mortality tables in calculating the periodic benefits to be received by persons retiring on or after June 1, 1980.[5] CREF moved for reargument, contending that the relief granted was improperly retroactive since it would alter the value of benefits that men

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5 This order obviously meant that LIU could no longer deal with TIAA unless TIAA "voluntarily" began to use gender-neutral mortality tables to calculate the benefits to be received by a retiring plan participant. It was also always clear that TIAA and CREF are so closely intertwined that, as a practical matter, TIAA would have to make changes in its method of calculating accrued benefits in order to synchronize with any changes made by CREF. Indeed, at a hearing after remand, Judge Ward stated, "I have always visualized TIAA and CREF somewhat like twins and I sort of separated the Siamese twins but I recognize that though I may have separated them in one way from a practical and business point of view they must follow the same course." JA 683.

would receive as a result of contributions made to CREF prior to the date of the district court's decision. This motion was denied on September 12, 1979. In October, 1979, defendants TIAA, CREF, and LIU, and plaintiff Spirt all filed Notices of Appeal from the judgment of the district court. However, these appeals were withdrawn from the active consideration of this Court on January 8, 1980, so that the district judge could supervise the settlement negotiations then proceeding between the parties. During this period, TIAA and CREF made several attempts to design and obtain approval for merged-gender, or "unisex" mortality tables for the calculation of annuity benefits attributable to contributions made after the proposal's adoption.[6] The first of these plans ("Unisex I") was disapproved by the EEOC. After modification, the plan ("Unisex II") was resubmitted and was approved by the EEOC, but was then disapproved by the New York State Superintendent of Insurance, Albert Lewis, in January and February, 1981.[7]

By February 19, 1981, settlement negotiations had collapsed, and this Court granted a limited remand of the case to allow consideration of TIAA-CREF's "good faith reliance" defense against the imposition of what they, and, apparently, Superintendent Lewis, considered to be retroactive relief, and to permit the plaintiff to join Superintendent Lewis as a party. Plaintiff then filed a supplemental complaint and a motion for summary judgment. TIAA-CREF cross-moved to dismiss the supplemental complaint for failure to state a claim upon which

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6 Apparently no attempt was ever made to design unisex tables for use in calculating benefits based on contributions accumulated prior to the date of the district court's order, although such tables would have been required if the parties were to comply fully with that order.

7 The disapproval of "Unisex II" was based on the Superintendent's view that the change would unfairly deprive male participants of the full value of contributions made while TIAA-CREF was using sex-based mortality tables. JA 621. Superintendent Lewis did approve a later merged-gender proposal ("Unisex III"), but Unisex III was disapproved by the EEOC, which viewed it as violative of Title VII and the Equal Pay Act.

relief could be granted. In an opinion dated March 19, 1982, the district judge rejected TIAA-CREF's good faith reliance defense, denied plaintiff's motion for summary judgment against Superintendent Lewis, granted defendants' cross-motion to dismiss the supplemental complaint, and granted motions by the EEOC and the American Association of University Professors ("AAUP") to intervene with regard to the issue of "good faith reliance." On March 29, 1982, the district court granted a stay pending appeal of its orders. TIAA-CREF and plaintiff filed Amended Notices of Appeal on April 7, and April 12, 1982, respectively. Virtually all of the issues decided by the district judge are now before us on appeal.

III. *Title VII Violation*

Title VII of the Civil Rights Act of 1964 was enacted in order to deal with the essential unfairness of employment discrimination. Members of Congress saw its provisions as a necessary element of the comprehensive anti-discrimination legislation of which it was a part because "[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2355, 2516. Title VII provides that

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

In *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978), the Supreme Court stated that pension benefits are "compensation" under Title VII, and held that Title VII was violated by an employer-run pension plan that paid all similarly-situated employees equal retirement

benefits, but required its female employees, while working, to make larger contributions to the pension fund than its male employees were required to make. In *Manhart* the Court acknowledged that "[a]s a class women live longer than men," 435 U.S. at 704, and that the differential treatment received by individual women was based upon actuarially-sound projections as to the total amount of benefits likely to be received by women as a class. The Court pointed out, however, that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708. In addition, the Court found that, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* Because there is no way of knowing prior to or at the time of retirement, which *individual* female retirees will fulfill actuarial predictions as to longevity and in fact live longer than the average male retiree, a requirement that *all* female employees make larger contributions than *all* male employees penalizes all female retirees who do *not* actually live longer than the average male retiree. Such a result, the Supreme Court held, violates Title VII because it does not "pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Id.* at 711 (footnote omitted).

Like the district judge, we can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart,* who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment acorded the female TIAA-CREF participants in this case. Although female TIAA-CREF participants make contributions to their retirement accounts that are equal in amount to those made by their male counterparts, they are paid a smaller monthly benefit upon retirement simply because they are women. Every federal court that has considered the issue has found that no legally significant difference exists between unequal contributions for equal payments and equal contribu-

tions for unequal payments. *See, e.g., Retired Public Employees' Association of California v. California,* 677 F.2d 733, 735 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity,* 671 F.2d 330, 334 (9th Cir. 1982), *cert. pet. filed,* Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College,* 589 F.2d 1139, 1144 (1st Cir. 1978); *Women in City Government United v. City of New York,* 515 F. Supp. 295, 298 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System,* 26 FEP Cases 527, 530 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.,* 476 F. Supp. 1343, 1350 (E.D. Mich. 1979). In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII. Each female TIAA-CREF plan participant is maintained at a lower economic level than her male counterparts for as long or short a time as she is alive to receive benefits, regardless of whether she is ultimately one of the few who outlives the average male participant or is one of the 84% of all women who do not outlive their male counterparts. *See Norris v. Arizona Governing Committee, supra,* 671 F.2d at 332 n.1.

The period of time over which the female TIAA-CREF participant will receive the lower benefits awarded her under the present plans is both indefinite and unknowable at the time of retirement. In addition, this lesser benefit will be received at a time when most often the recipient must live on a fixed income, and is unable to increase her benefits as she might increase her salary by working for a promotion during her working years. It is also received at a time—in her older years—when the amount of dollars available to her is apt to crucially affect her ability to meet her basic needs. It was largely because of its concern with this dependence on pension benefits in workers' retirement years that Congress enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), in 1974. The House Committee stated in this regard that ERISA's "most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity,

and without fear that this period of life will be lacking in the necessities to sustain them as human beings in our society." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4646.

Defendants attempt to argue that the TIAA-CREF plans are fair to both men and women because each individual participant receives a benefit package that is of actuarially equal value. This argument is unconvincing because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarially equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups.

In the time elapsed since its decision in *Manhart* the Supreme Court has not modified in any way its focus on "fairness to individuals rather than fairness to classes," 435 U.S. at 709, in Title VII cases. To the contrary, in *Connecticut v. Teal,* 50 U.S.L.W. 4716 (U.S. June 21, 1982), the Supreme Court held that where a promotional examination had a racially disparate impact on blacks, the employer could not defend the use of the exam on the ground that a higher than average percentage of the blacks who did pass the test were in fact promoted, with the result that the "bottom line" impact was not only nondiscriminatory, but was actually more favorable to blacks as a group than to whites. In reaching its decision the Court stated that "[i]t is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employee's group." 50 U.S.L.W. at 4720.

We also reject defendants' claim that it would be unfair to equalize the monthly benefits to be received by male and female annuitants because men, as a class, will then receive less total benefits than will women as a class. First, this argument loses sight of the need to focus on impact on individuals as opposed to impact on a class. Further, under an equal benefit system each individual male annuitant will be treated in exactly

the same way as each of his female counterparts. Under such a system, an individual male annuitant will be disadvantaged only as compared to his male counterparts who have in the past received larger benefits as a result of TIAA-CREF's sex-based discrimination in their favor. Male participants in TIAA-CREF are not being treated unequally when the risk that each and every annuitant, male and female, will live longer than the average is spread across the entire covered population rather than being imposed on one sub-group within that total population. The fact that such equal spreading of risk may have the result that, from a statistical point of view, men as a *class* subsidize somewhat the benefits received by women as a *class* is irrelevant in the context of a statute that seeks fairness to *individuals,* and is not, in any event, contrary to the continuing intent of Congress, as such intent was evidenced in 1978, when it amended Title VII to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976).

In *Gilbert* the Supreme Court held that an employer's disability benefits plan that failed to provide coverage for pregnancy-related disabilities did not discriminate against women in violation of Title VII. Congress quickly responded to this decision by adding 42 U.S.C. § 2000e(k) to Title VII. That section provided that

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

Congress was aware that this amendment would increase the cost of work-related disability and health insurance plans, *see* H.R. Rep. No. 948, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 4749, 4757-58, and specifically understood and intended that in the case of contributory

programs the amendment would require that *all* employees—not just women—would be assessed their proportionate portion of the incremental cost. *Id.*, [1978] U.S. Code Cong. & Ad. News at 4756.

We find, therefore, that TIAA-CREF's use of sex-distinct mortality tables constitutes unequal treatment based solely on an individual's sex. In order for this practice to violate Title VII, however, the unequal treatment must be practiced by an "employer." It is clear that plaintiff's contract for retirement benefits is not with LIU, but with TIAA-CREF, an independent insurer. Plaintiff clearly is not an employee of TIAA-CREF in any commonly understood sense. However, it is generally recognized that "the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law." *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979). *See also Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1261-62 (N.D. Ohio 1981); *Puntolillo v. New Hampshire Racing Commission*, 375 F. Supp. 1089 (D.N.H. 1974).

We agree with the district judge that TIAA and CREF, which exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees, are so closely intertwined with those universities, (in this case LIU), that they must be deemed an "employer" for purposes of Title VII. It is also relevant that participation in TIAA-CREF is mandatory for tenured faculty members at LIU, and that LIU shares in the administrative responsibilities that result from its faculty members' participation in TIAA-CREF.

In addition, the language of the Supreme Court in *Manhart* would seem to compel a finding that delegation of responsibility for employee benefits cannot insulate a discriminatory plan

from attack under Title VII. The Court stated therein that it did not wish to "suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718 n.33. Finally our conclusion here is in accord with that of a number of other courts. These courts have recognized that exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII, and have held *Manhart* applicable to pension plans run by third-party insurers. *See Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978) (holding TIAA-CREF subject to Title VII); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1266 (N.D. Ohio 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1350 (E.D. Mich. 1979) (holding TIAA-CREF subject to Title VII).

IV. *Impact of the McCarran-Ferguson Act*

Having determined that the TIAA-CREF benefit systems discriminate against women in violation of Title VII, we must determine whether there is any countervailing federal law or policy which renders Title VII inapplicable to TIAA and/or CREF. TIAA and CREF contend that because they are engaged in the business of insurance they are exempted from compliance with Title VII by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* ("the McCarran Act").

The McCarran Act provides, in pertinent part, that

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

The McCarran Act will exempt defendants TIAA and/or CREF from conforming their operations to the mandates of

Title VII only if (1) defendants are engaged in the business of insurance; (2) Title VII does not specifically relate to the business of insurance; and (3) Title VII, as construed, invalidates, impairs, or supersedes a state law enacted to regulate the business of insurance. The district judge looked to each of these criteria and concluded that the McCarran Act exempted TIAA, but not CREF, from the requirements of Title VII. We find that the McCarran Act exempts neither TIAA nor CREF from such compliance, and reverse the ruling below as to TIAA.

Judge Ward found that the McCarran Act did not exempt CREF from compliance with Title VII because CREF was not in the business of insurance. We agree. CREF is a variable annuity company.[8] As such it does not commit itself to pay a pre-determined amount of benefit each month. How much it actually does pay is determined periodically, and directly reflects the results of the fund's investment policies. Thus, a variable annuity company is not subject to the risk that its obligations will exceed its return on investments.

As the Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 71 (1959), variable annuity plans like CREF have a number of the characteristics of insurance. The variable annuity company pays its annuitant on a periodic basis, and continues to do so until the death of the annuitant, or for a fixed period; payments are made from both income and principal; and the amount of benefit each annuitant receives is calculated on the basis of traditional actuarial principles which take into account, *inter alia*, age and sex. Finally, the issuer assumes the risk of mortality—that is, that the annuitant will live longer than predicted on an actuarial basis. Nevertheless, the *Variable Annuity* Court found that "absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing." *Id.* (foot-

8 The Supreme Court noted in *SEC v. Variable Annuity Co.*, 359 U.S. 65, 69 (1959), that CREF was the first variable annuity company in the United States.

note omitted). The Court then went on to hold that since the "concept of 'insurance' involves some investment risk-taking on the part of the company," the issuer of variable annuity contracts is not engaged in the business of insurance and is not protected from federal regulation by virtue of the McCarran Act. *Id. See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-12 (1979). Therefore, the district judge was correct in holding that CREF is not in the business of insurance and is required to comply with the mandate of Title VII.

On the other hand, TIAA commits itself, at the time a plan participant retires, to pay the retiree a specific, fixed amount of money each month. As a result, TIAA is subject to investment risk. Since its contracts, like those issued by CREF, have the other characteristics of insurance contracts, we will assume, as TIAA contends and as the district judge found, that TIAA is in the business of insurance. Our next step, then, is to determine whether Title VII specifically relates to the business of insurance. If not, we must then determine whether a holding that TIAA must pay equal monthly benefits to all of its annuitants would be a holding in which we construed an Act of Congress so as to invalidate, impair, or supersede a state law enacted to regulate the business of insurance in violation of the McCarran Act.

The McCarran Act was enacted in 1945 in direct reaction to the Supreme Court's decision in *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944), one year before. In *South-Eastern Underwriters* the Court held that insurance companies involved in insurance transactions across state lines were engaged in interstate commerce and subject to federal regulation under the Commerce Clause. Therefore, the Court found, the price-fixing activities of such insurance companies were subject to attack under the Sherman Antitrust Act. This holding created the fear that traditional forms of state regulation and taxation of insurance companies doing business within the state could be invalidated on Commerce Clause grounds, and that the insurance industry would be thrown into chaos as a result. Thus, Congress' purpose in adopting the

McCarran Act was only to ensure that the states would be permitted to fulfill their traditional role in relation to insurance regulation. As stated by the Supreme Court, the intent was, first, "to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack," *Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 440 U.S. 205, 218 n.18, and, second, to give insurance companies only a limited exemption from the antitrust laws. *Id. See also SEC v. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969) ("Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies."). According to the legislative history, it was "not the intention of Congress to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision . . . in the *South-Eastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., *reprinted in* [1945] U.S. Code Cong. Svce. 670, 671 (Feb. 13, 1945).

We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance." *Accord, EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1265 (N.D. Ohio 1981); *Women in City Government United v. City of New York*, 515 F. Supp. 295, 302-03 (S.D.N.Y. 1981).

The view that the McCarran Act does not render Title VII inapplicable to an employment-related pension plan finds further support in the Congressional debates surrounding the enactment of ERISA (a statute which clearly "specifically relates to the business of insurance") in 1974. It is clear from those debates that the members of Congress believed that Title VII did specifically prohibit racial and sex-based discrimination in pension benefit programs. As summarized by the Seventh Circuit:

> Senator Mondale and Representative Abzug sought to include in ERISA provisions prohibiting discrimination in the administration of welfare benefit plans. Senator Williams assured Senator Mondale that such an amendment would be unnecessary and might undermine federal anti-discrimination efforts, stating: 'I believe that . . . centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunities Commission under terms of existing law.' 119 Cong. Rec. 30409 (1973). Representative Dent reiterated in the House that discrimination could best be prohibited 'under terms of existing law.' 120 Cong. Rec. 4726 (1974). On this basis, ERISA was not amended to prohibit discrimination.

Bucyrus-Erie Co. v. Dept. of Industry, Labor & Human Relations, 599 F.2d 205, 211-12 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). *See also Women in City Government United v. City of New York*, 515 F. Supp. 295, 304-05 (S.D.N.Y. 1981).

Furthermore, in this case Title VII is not being *construed* to *implicitly* pre-empt state laws. Title VII contains a broad and explicit pre-emptive provision. *See* 42 U.S.C. § 2000e-7. That section provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

To the extent that New York law either permits, or seeks to enforce the use, or continued use, of gender-based mortality tables in violation of Title VII, it is clearly pre-empted under § 2000e-7. The McCarran Act was never meant to prevent, and could not prevent, Congress from explicitly imposing require-

ments on employers and their agents under the civil rights statutes, the National Labor Relations Act, or any other statute that seeks to enforce compliance with federal policies in such fields as civil rights, labor and other areas of national concern.

We hold, therefore, that Title VII explicitly pre-empts New York insurance laws to the extent that they "require or permit" a method of calculating pension benefits that we have found to be "an unlawful employment practice" under Title VII. Therefore, the McCarran Act does not exempt TIAA from complying with the dictates of Title VII. Having so held, we need not reach the question whether application of Title VII will invalidate, impair, or supersede New York State insurance law.[9]

It is to be noted, however, that although the State Superintendent of Insurance has approved two sets of proposed unisex mortality tables for calculation of benefits based on contributions made after the date the new plans are approved, he has indicated that he will not approve such tables for use in calculating benefits based on contributions made prior to the effective date of the new plans. Obviously, our holding that Title VII pre-empts state insurance law with which it conflicts dictates that where the relief ordered necessarily has an impact on contributions paid to TIAA and CREF prior to the effective date of our order, the New York State Superintendent of Insurance will be precluded from disapproving plans designed to conform with the order.[10]

V. *Relief*

Judge Ward enjoined CREF from using sex-based mortality tables to calculate the number of annuity units to which plan participants are entitled upon their retirement on or after May

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9 In light of our holding that Title VII applies to both TIAA and CREF and that it has been violated by their sex-based method of calculating retirement benefits, we need not reach the secondary issues raised on appeal.

10 We note that the Superintendent has indicated that he will, of course, comply with a final order of this Court.

1, 1980. He also enjoined LIU from making contributions on behalf of its employees, and/or from requiring its employees to contribute to any retirement plan that continued to use sex-based mortality tables after June 1, 1980. In reviewing an award of relief we must determine whether the judge below abused his discretion "to locate a 'just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975) (quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931)).

In light of our holding that TIAA is subject, as is CREF, to the mandate of Title VII, any relief awarded to plaintiff will apply equally against both.

The order enjoining LIU from making contributions to any pension fund making use of sex-based mortality tables to calculate benefits accruing as a result of contributions made after June 1, 1980, logically follows from the holding that the use of such tables constitutes discrimination on the basis of sex in violation of Title VII, and must be affirmed. It is also clear that the part of Judge Ward's order requiring CREF to use gender-neutral mortality tables to calculate benefits that result from contributions made after the effective date of the order, May 1, 1980, must be affirmed, and extended to include TIAA. Defendants have already attempted to revise their practices to conform to the above. However, they have not presented for approval gender-neutral tables for the calculation of benefits based on contributions made prior to May 1, 1980, but first payable upon a plan participant's retirement after that date. Instead, they have argued that any further relief would be improper since it would "retroactively" affect the value of contributions made prior to the district court's order in this case. They contend that the *Manhart* Court's rejection of the plaintiffs' claims for retroactive relief in that case dictates that no retrospective relief is available here. Assuming, without deciding, that the part of Judge Ward's order that affects the value of contributions made prior to the entry of judgment in this case constitutes retroactive relief, nothing in *Manhart* proscribes such a result. The *Manhart* Court itself pointed out that "[t]o the point of redundancy, the statute stresses that

retroactive relief 'may' be awarded if it is 'appropriate,' " 435 U.S. at 719, and that the "presumption in favor of retroactive liability can seldom be overcome." *Id.* The Court then went on to find that under the special circumstances presented in that case retroactive relief was not "appropriate." In so finding the Court stated:

> For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies. Although we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful . . . . [P]ension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden. *There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.*

435 U.S. at 722-23 (footnotes omitted) (emphasis added). The Supreme Court then characterized its decision as a "marked departure," 435 U.S. at 722, from past practice, and stated that since retroactive relief in the form of refunds to women of the additional moneys they had paid into the fund in the past would constitute an enormous unforeseen liability that would threaten the solvency of the fund, a "backpay award" was unjustified. In this case, however, none of the factors that influenced the *Manhart* Court is present to render "inappropriate" an order of relief that affects the value of contributions paid to the pension fund prior to the entry of judgment below. First, *Manhart* was decided by the Supreme Court over four years ago. Since the decision of that case a number of federal district courts and courts of appeals have declared plans like those at issue here to be unlawful in light of *Manhart*. *See*

Retired Public Employees' Association of California v. California, 677 F.2d 733 (9th Cir. 1982); *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-52 (U.S.L.W. July 27, 1982); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343 (E.D. Mich. 1979). The record indicates further that in 1974, as a result of the Secretary of Labor's public request for comments on proposed sex discrimination guidelines, TIAA-CREF wrote to its member institutions in order to encourage them to oppose regulations requiring the use of gender-neutral mortality tables. *See* JA 485-87. In addition, this suit was filed against TIAA-CREF in April, 1974. The *Peters* action was filed in 1976. 476 F. Supp. 1343, 1345. In 1978 the First Circuit reversed the Maine District Court's grant of summary judgment in favor of defendants in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), and remanded for further proceedings. Both *Peters* and *Colby College*, as well as other suits not yet decided, involved TIAA-CREF, and certainly put defendants TIAA-CREF on notice as to the questionability of their practices. They have had ample opportunity to "voluntarily" revise their mortality tables. The possibility of an order such as that entered by the district court, and by this court today, was foreseeable at least since 1974.[11]

It also must be recognized that the "retroactive" relief awarded here is not nearly so drastic as that sought by

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11 The pension plan at issue in *Manhart* had been altered to equalize both contributions and benefits for male and female employees by the time that case reached the Supreme Court. The change was effective on January 1, 1975, *see* 435 U.S. at 706, prior to the affirmance of the district court's order by the Ninth Circuit. The plan at issue in *Retired Public Employees' Association of California v. California*, 677 F.2d 733 (9th Cir. 1982), also was amended in 1977 to equalize contributions and benefits for male and female employees. *Id.* at 734 n.1.

plaintiffs and awarded by the district court in *Manhart*. There the district court's order that all female employees and retirees receive refunds of all excess contributions made to the plan since April 5, 1972, when Title VII became applicable to governmental employers, *see Manhart v. City of Los Angeles Dept. of Water & Power*, 553 F.2d 581, 583 (9th Cir. 1976), *vacated and remanded*, 435 U.S. 702 (1978), required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves. The equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds. A result which did not affect past contributions and granted only "prospective" relief, as that is defined by defendants, would effectively postpone full conversion to gender-neutral tables for as much as 30 to 40 years.

Finally, we must reject the argument that an award of relief that adversely affects the value of contributions made by or on behalf of male employees prior to the date of the order herein will unfairly violate those males' expectations of receiving pension benefits based on mortality tables that discriminate in their favor. First, this argument assumes that male employees had some *clearly settled* expectations that *will be* violated. On the contrary, the literature distributed to TIAA-CREF participants emphasizes the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. The literature states that:

> The amount of your retirement income will depend on the number of years you participate in the plan, the amount of premiums paid each year during your participation, your age at time of retirement, the experience of TIAA and CREF, the income option you select at retirement, and other factors. Although it is not possible to predict the effect of each of these factors upon your retirement

> income, the remaining portion of this booklet should be helpful in calculating the benefits that would be produced under certain conditions.

"TIAA-CREF: Your Retirement Annuity" at 14, JA 233. Later in the same publication it is stated that "[j]ust as you can't predict your future salary or retirement age, neither can TIAA predict economic and social conditions. Therefore, the TIAA annuity amounts may be greater or less than those shown because of the following factors: . . ." *Id.* at 16, JA 234. It is then stated, *inter alia*, that on three months' notice TIAA can establish a new rate schedule for future premiums. *Id.* While TIAA does guarantee its participants certain minimal monthly payments, the amounts guaranteed are so low—since they are figured on the basis of a 2½% return on investments, *see* JA 197—that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes in the value of past benefits necessitated by the relief ordered herein.

CREF, on the other hand, guarantees plan participants no specified amount of monthly payments. The TIAA-CREF publication which explains the CREF system states that:

> The CREF annuity pays you a retirement income that varies year by year, reflecting primarily the experience of the securities in CREF's portfolio. When you retire, your accumulation units are converted into a lifetime monthly income of a fixed number of 'annuity units.' . . . The number of annuity units payable to you each month for life depends on such factors as how many accumulation units you own at time of retirement, the age at which you retire, your sex, and whether you choose an income method that continues payments to a beneficiary after your death.

"TIAA-CREF—CREF Units at Work" at 3; JA at 415. Based on statements such as this, no employees could have had settled expectations as to the amount of monthly benefits they would receive upon retirement.

While it is true that the above-quoted literature states, as does other literature sent to TIAA-CREF participants, that sex will be considered in calculating the amount of monthly benefits to be received after retirement, these statements are neither so clear, nor are they highlighted in such a way, that it is plausible to think that male plan participants relied upon them in any meaningful way. In any case, such statements would not be a major factor in inducing men to participate in TIAA-CREF plans. First, at least at LIU, participation has been mandatory for most covered employees. Second, the uniqueness of TIAA-CREF, particularly its qualities of immediate vesting and portability, would constitute inducements to participation more powerful than the belief that men's benefits would be paid at a rate higher than those paid to similarly-situated women. It is also not clear that men could actually do better purchasing a plan on the open market than they will by participating in TIAA-CREF plans that make use of gender-neutral tables, given the economies of scale that would presumably be present in the administration of such a large group plan. Further, the benefits to be received by many male participants will be unaffected by the shift to gender-neutral tables because approximately 60% of all male participants select a joint-survivor option which provides for an income that continues for the duration of their wives' lifetimes as well as their own. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550. Since in these cases actuarial projections as to the wives' likelihood of surviving, based on sex-based mortality tables, have always been figured into the calculation of the amount of benefits to be received by their husbands upon retirement, the change will have little or no impact on the benefits to be received by these men. *Id.*[12]

Finally, reliance on the continued use of sex-distinct mortality tables by male pension plan participants was unjustified in

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12 Thus, the changes mandated by this decision will reduce the benefits that would be received by approximately 40% of male TIAA-CREF participants, based on sex-distinct mortality tables, by between 1% and 8%. *See* TIAA-CREF, *The Participant* (March, 1980) at 2, JA 550.

light of the visibility of the issue of the legality of using such tables, at least since it was brought to the attention of all participants in 1973. *See* TIAA-CREF, *The Participant* (July, 1973), JA 477-84.

A delayed award such as that which defendants contend is proper would fly in the face of the primary purpose of Title VII—to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). We therefore hold that CREF was properly enjoined from using sex-distinct mortality tables to calculate the number of annuity units to which all persons retiring after May 10, 1980 [sic] are entitled, and TIAA is now similarly enjoined from using sex-distinct mortality tables to calculate the amount of monthly benefits to which its participants are entitled upon retirement. This order will affect all calculations of retirement benefits made after May 1, 1980, as per the stipulation between the parties dated March 29, 1982. JA 792-93. In addition, LIU was properly enjoined from making contributions to, or requiring its employees to make contributions to, any pension fund that continues to use gender-based mortality tables to calculate retirement benefits for employees retiring after June 1, 1980. *See* JA 792-93.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion.

Opinion of the District Court dated January 23, 1976

DIANA L. SPIRT, etc.,

Plaintiff,

—against—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, *et ano.*,

Defendants.

No. 74 Civ. 1674

United States District Court,
Southern District of New York
January 23, 1976

Plaintiff Diana L. Spirt ("Spirt") moves pursuant to Rule 56, Fed. R. Civ. P., for partial summary judgment declaring certain actuarial tables used by defendants in annuity contracts with plaintiff to be violative of the Constitution and statutes of the United States and for class action certification pursuant to Rule 23, Fed. R. Civ. P. Defendants Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF") cross-move pursuant to Rule 56, Fed. R. Civ. P., for summary judgment dismissing this action.

Pending decision of the cross-motions for summary judgment, plaintiff's motion for class action certification was adjourned. After that postponement, defendants moved under Rule 12(h)(2), Fed. R. Civ. P., for dismissal of the complaint for failure to join indispensable parties as required by Rule 19, Fed. R. Civ. P. Rule 19 is expressly "subject to the provisions of Rule 23." Inasmuch as it involves determinations of the appropriate classes of persons involved in this litigation, defendants' motions will be considered in conjunction with plaintiff's Rule 23 motion.

Plaintiff, a female professor at Long Island University, charges sex discrimination in the operation of a pension plan administered by defendants. This pension plan utilizes actuarial tables which indicate that women at retirement age have a longer life expectancy than do men at that same age. Consequently, the amount of each periodic payment made to a female annuitant selecting a single-life option is smaller than that paid her male counterpart. Use of sex-based tables and the disparity in treatment which results, Spirt claims, constitute violations of the Fourteenth Amendment to the Constitution, 42 U.S.C. § 2000(e)(1) *et seq.* ("Title VII"), 42 U.S.C. § 1981 *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 209(d). TIAA and CREF deny that their pension plan unlawfully discriminates asserting instead that the plan has a demonstrably rational and equitable basis.

Summary judgment is appropriate only if the record clearly indicates that no genuine issue of material fact exists. In several recent cases, the Second Circuit has indicated that summary judgment should be selectively granted. *Heyman* v. *Commerce & Industry Insurance Company*, Docket No. 75-7230 (2d Cir. Oct. 24, 1975); *Judge* v. *Buffalo*, Docket No. 75-7314 (2d Cir. Oct. 24, 1975). In the words of the Court of Appeals:

> [T]he "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. *American Manuf. Mutual Ins. Co.* v. *American Broadcasting Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967); *Cali* v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971). Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue geniunely in dispute, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 157 (1970). *Heyman, supra.*

See also, *Jaroslawicz* v. *Seedman*, Docket No. 75-7299 (2d Cir. Dec. 19, 1975).

In language which speaks directly to this action the Second Circuit recently stated:

> The fact that both sides in the instant case sought summary judgment does not make it more readily available. *American Manuf. Mutual Ins. Co.* v. *American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2 Cir. 1967). Although all the litigants claim that the insurance policy is unambiguous, they sharply disagree over the meaning of the batch clause and the intent behind its addition to the contract; the affidavits also place in issue the understanding and custom of the insurance industry regarding such clauses. Since these issues of material fact are controverted by the parties, further proceedings on the merits are needed. *National Life Insurance Co.* v. *Solomon and Schuster*, Docket No. 75-7294 (2 Cir. December 9, 1975), slip op. 939.
>
> *Home Insurance Co.* v. *Aetna Casualty & Surety Co.*, Docket Nos. 75-7357, 75-7359 (2d Cir. Jan. 13, 1976).

Faced with such a clear directive from the Court of Appeals, this Court is compelled to deny summary judgment if issues of fact remain outstanding.

Comparison of the statements of material facts submitted by the parties indicates that questions of fact do exist. For one, there is an apparent dispute as to whether Spirt complied with the procedures mandated by 42 U.S.C. § 2000 e-5, which defer filing of a charge with the Equal Employment Opportunities Commission ("EEOC") until 60 days after proceedings have been commenced before a state or local unlawful employment practices agency. Defendants claim that no proceedings were instituted before the New York State Division of Human Rights. Plaintiff responds by submitting a copy of a letter received from the EECO which she contends, "reflects the appropriate deference to the state and full compliance with Title VII." The letter, however, simply instructs plaintiff to communicate with the state agency to ensure that proceedings

were properly commenced. There is no indication that such action was taken. And, *Love* v. *Pullman*, 404 U.S. 522 (1972) cited by plaintiff, does not support her argument since in that instance there was evidence of an indication by the state agency that it declined to act. 404 U.S. at 525. The jurisdictional point raised presents a fact issue which prevents the Court from granting summary judgment.

Furthermore, the parties disagree over whether the contracts between TIAA and CREF and the annuitants constitute terms and conditions of employment. This mixed question of fact and law is essential to plaintiff's Title VII claim.

The tone, as much as the substance of the statements of material facts, indicates how inadvisable summary judgment would be at this juncture. Defendants have submitted what they denominate "Response to Plaintiff's Statement of Material Facts and Supplemental Statement of Material Facts." They proceed to take issue with plaintiff's statement, characterizing one item as "untrue" and claiming that another ignores certain facts. Throughout their papers the parties seem to be at odds over the most crucial aspect of this case: the actuarial tables themselves. The use and interpretation of these statistical compilations lies at the heart of the action and is essential to a determination of the issue on which plaintiff seeks partial summary judgment.

As noted above, summary judgment is inappropriate so long as issues of fact exist. It is evident that fact questions remain in this action. The claim in this case is a complex mix of fact and law, challenging, as it does, the use and construction of statistical data; a trial on the merits is indicated to disentangle the important questions presented. Accordingly, both plaintiff's motion for partial summary judgment and defendants' cross-motion for summary judgment are denied. The remaining motions are adjourned for thirty days from the date of this decision to enable the parties to submit any additional papers in connection with those motions.

It is so ordered.

/s/ ROBERT J. WARD
U. S. D. J.

Opinion of the District Court dated July 1, 1976

DIANA L. SPIRT, etc., *Plaintiff,*

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA et al., *Defendants.*

No. 74 Civ. 1674

United States District Court,
Southern District of New York

July 1, 1976

OPINION

ROBERT J. WARD, *District Judge.*

Plaintiff Diana L. Spirt ("Spirt") moves for class action certification pursuant to Rule 23, Fed.R.Civ.P. Defendants Teachers Insurance and Annuity Association of America ("TIAA") and College Retirement Equities Fund ("CREF") cross-move for an order pursuant to Rule 56, Fed.R.Civ.P., granting partial summary judgment in their favor and for an order pursuant to Rules 12(c) and 19(a), Fed.R.Civ.P., dismissing this action for failure to join indispensable parties. For the reasons hereinafter stated, the motions are denied with the exception of the motion to dismiss for failure to join indispensable parties which is conditionally granted in part.

Plaintiff, a female professor at Long Island University ("LIU"), charges sex discrimination in the operation of a pension plan administered by defendants. This pension plan utilizes actuarial tables which indicate that women at retirement age have a longer life expectancy than do men at that same age. Consequently, the amount of each periodic payment made to a female annuitant selecting a single-life option is

smaller than that paid her male counterpart. Use of sex-based tables and the disparity in treatment which results, Spirt claims, constitute violations of the Fourteenth Amendment to the Constitution, 42 U.S.C. § 2000(e)(1) *et seq.* ("Title VII"), 42 U.S.C. § 1981 et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). TIAA and CREF deny that their pension plan unlawfully discriminates asserting instead that the plan has a demonstrably rational and equitable basis.

1. *Defendants' Motion for Partial Summary Judgment.*

Defendants move for partial summary judgment claiming that plaintiff has failed to comply with the jurisdictional prerequisites to a suit under Title VII. Two lapses in this regard are cited. First, the complaint in this action was filed on April 15, 1974 while no charge was filed with the Equal Employment Opportunities Commission ("EEOC") until on or about October 19, 1974. The EEOC issued a Notice of Right to Sue on August 4, 1975.

A Right to Sue letter has been held to have the effect of ratifying a prior filed suit. The Court in *Black Musicians of Pittsburgh v. Local* 60-471, *American Federation of Musicians,* 375 F.Supp. 902, 906-07 (W.D.Pa.1974) stated:

> Here, . . . the suit was brought *before* the issuance of the right to sue letter, even before the filing of the charge with the EEOC. Asserting one's rights too late is quite a different matter from asserting them too soon. *Henderson v. Eastern Freight Ways.* [460 F.2d 258 (4th Cir. 1972)] . . .. [T]he issuance of the right to sue letter, in effect, validated the pending suit making it unnecessary to file another suit. Under the circumstances, we do not think a dismissal of the complaint at this stage would fulfill the purposes of the [Civil Rights] Act.

Defendants renew their argument that plaintiff has not pursued her remedies at the state level, as mandated by the statute. In dealing with this matter, the Court is mindful of the recent decision by the Court of Appeals in *Egelston v. State*

University College at Geneseo, 535 F.2d 752 (2d Cir. June 7, 1976). The Court of Appeals noted that summary judgment must be used sparingly and observed:

> There is an additional factor equally vital to the resolution of this case. Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the statute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act. Prior decisions, both of the Supreme Court and of this Circuit have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today.

Finally, the Court expressed a preference that such issues be left to trial.

Defendants' initial motion for summary judgment based upon plaintiff's alleged failure to pursue her state remedies was denied because factual questions remained. They now seem to have multiplied. A determination of the extent and nature of communications between Spirt and her attorney and the state authorities is best left to trial, where, for example, testimony could be adduced as to "the standard practice of the New York State agency." At that time also perhaps the meaning of the EEOC phrase "Failure to Proceed," can be clarified. At this point, these factual questions are open. This coupled with the Court of Appeals' implied directive that issues of compliance with Title VII's procedural demands be resolved at trial compels the Court to deny defendants' motion for partial summary judgment.

II. *Defendants' Motion to Dismiss for Failure to Join Indispensable Parties*

TIAA-CREF move to dismiss for failure to join indispensable parties. They claim that joinder of both the employer educational institution, LIU, and of all the male participants in the challenged pension system is mandated.

Rule 19(a), Fed.R.Civ.P., states in pertinent part:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Briefly outlined, the operation of defendants' pension program, as described in their papers, is as follows. The plan is commonly established by resolution of the board of trustees of the educational institution. Provision is made for a particular percentage of salary to be contributed both by the institution and by the employee. There is no contract between TIAA and CREF and the institution; instead, an individual contract is sent by defendants to the employee.

TIAA-CREF claim that, should plaintiff succeed in this action, costs of the pension program will rise and these increased costs will likely be borne by the participating institutions. Therefore, LIU, as such an institution, has an interest in this litigation which requires its joinder. Additionally, defendants argue complete relief is impossible in the absence of the employer.

These contentions would appear to have merit. In *Barninger v. National Maritime Union,* 349 F.Supp. 803, 805 (S.D.N.Y.1972), it was determined that trustees of a pension plan would remain as party defendants where their involvement concerned more than "a mere administrative detail of pension trust administration." Here, LIU has chosen to adopt defendants' system and to contribute to it; this constitutes affirmative, active participation.

To join LIU is not to suggest its liability. *Hodgson v. School Board, New Kensington-Arnold School District,* 56 F.R.D. 393 (W.D.Pa.1972) involved a claim under the Equal Pay Act in which the defendant School Board sought to join the Union representing the employees whose compensation was at issue. The Court, in granting the School Board's motion, observed:

> This action endemically involves the potential for altering and restructuring the compensation provisions of the collective bargaining agreement between the defendant and the proposed defendants.

56 F.R.D. at 395.

The absence of a contract *per se* between the University and TIAA-CREF is not significant; the instant suit may yet alter the relationship between these institutions as embodied in and effectuated through the resolution and the individual contracts.

Additional support for the joinder of LIU is offered by *McDonald v. General Mills, Inc.,* 387 F.Supp. 24 (E.D. Cal.1974). In that action, a female student at Sacramento State College charged sex discrimination by employers who had interviewed through the College's Graduate Placement Center. The court joined the College as a party, "so that complete, consistent, and efficient settlement of the controversy can be achieved." 387 F.Supp. at 38.

Here, too, resolution of Spirt's claim that defendants' pension program is discriminatory requires the presence of her employer LIU. Without the University's participation, the challenged program could not operate. When an entity is more accurately described as an "active participant," rather than merely a "key witness," joinder is indicated. *Haas v. Jefferson National Bank,* 442 F.2d 394, 398 (5th Cir. 1971).

It should also be noted that in her charge to the EEOC, Spirt named both LIU and TIAA-CREF. Clearly, the relationship out of which the alleged discrimination grows is a triangular one. Rule 19(a), Fed.R.Civ.P., mandates the presence of LIU and the Court directs its joinder.

Defendants have also moved for the joinder of all the male participants in the pension plan, asserting that if the changes demanded by plaintiff are effectuated, the males will bear the burden of increased costs and may sue TIAA-CREF on a reverse discrimination theory. Thus, it is claimed, the males have an interest in the outcome of this suit and their absence poses a risk to the defendants.

Among the authorities cited by TIAA-CREF is *English v. Seaboard Coast Line Railroad Company*, 465 F.2d 43 (5th Cir. 1972). That case does indeed include a helpful discussion. While bowing to the discretion of an experienced trial judge in joining white employees in a suit by black workers charging racially discriminatory employment practices, the Court of Appeals observed that, "it is clear that Rule 19(a) has never required joinder in every case in which 'interests' of white persons may be adversely affected by a court decree terminating racially discriminatory practices." 465 F.2d at 46.

The Supreme Court, too, has recently dealt with the question of reverse discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976). In awarding retroactive seniority status to a class of black employees, the court confronted the argument that this would conflict with the economic interest of other workers.

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial

> model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States v. Bethelehem Steel Corp.*, 446 F.2d 652, 663 (C.A.2, 1971).

424 U.S. at 774, 96 S.Ct. at 1269, 44 U.S.L.W. at 4364.
In a footnote to this statement, the court cited the Fifth Circuit's decision in *Volger v. McCarty, Inc.*, 451 F.2d 1236, 1238-39 (1971):

> Adequate protection of Negro rights under Title VII may necessitate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination.

424 U.S. 775, 96 S.Ct. at 1269, 44 U.S.L.W. at 4364 n. 35.

Title VII forbids sex discrimination as well as racial bias. In fashioning a remedy to correct violations of the Act, the courts cannot be deterred by fears of potential adverse impact upon beneficiaries of a discriminatory *status quo*. There can be no vested interest in an unlawful practice.

Since the male participants cannot legitimately assert a protectable interest, they need not be joined pursuant to Rule 19(a). And, their absence poses no threat to TIAA-CREF. If the challenged pension program is found to violate the laws prohibiting sex discrimination and defendants are ordered to alter its operation, the affected men could not succeed in a claim asserted against good faith compliance with such a decree. Accordingly, the male participants need not be joined.

III. *Plaintiff's Motion for Certification as a Class Action.*

Lastly, plaintiff's motion for certification as a class action must be determined. The Court is guided by the following provisions of Rule 23, Fed.R.Civ.P.:

> *(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> *(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The discussion of the class action format in employment discrimination suits found in *Bradford v. Peoples Natural Gas Company, Inc.*, 60 F.R.D. 432, 435 (W.D.Pa.1973) is worth noting:

> As a general rule of thumb it might be said that where employment discrimination is urged on the basis of specific circumstances relating to the individuals involved, a class action would be inappropriate. The same would be true if the issue depended on construction or application of particular language in a statute or collective bargaining contract, where relitigation would normally be effectively barred by *res judicata*. The class action technique would be more appropriate however, where a general policy

> adverse to the advancement of womankind is involved, not directed towards particular individuals nor involving specific issues of law or fact, but having a general adverse impact on numerous individuals arising as a consequence of such policy.

In the Court's view, the instant action falls within the second category.

Defendants' practice of using sex-based actuarial tables is under attack in this action. This usage constitutes a definite fact issue. It does not relate to the discrete grievance of a single individual. Nor does it involve a generalized amorphous policy of refusing to hire or promote or confer certain benefits upon a specific disadvantaged group.

The issue in this suit is a narrow one and specifically directed at the actuarial tables utilized by defendants in the operation of their pension programs. The resolution of the question of whether their use constitutes sex discrimination would not be assisted by maintenance of this suit as a class action.

Judge Friendly, in *Galvan v. Levine,* 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied,* 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974), stated:

> [Rule 23(b)(2)] authorizes maintenance of a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in *Vulcan Society v. Civil Services Comm'n,* 490 F.2d 387, 399 (1973), what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated, see *Bailey v. Patterson,* 323 F.2d

201, 206-207 (5 Cir. 1963), *cert. denied,* 376 U.S. 910, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964); cf. *United States v. Hall,* 472 F.2d 261, 266 (5 Cir. 1972), as the judgment did here. The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy.

The practical significance of the denial of class action designation was thus limited to the claim for a mandatory injunction ordering monetary restitution.

TIAA-CREF admit, in their memorandum opposing this motion that, "a decision in [plaintiff's] favor, practically speaking, would equally affect all participants in the future." Clearly, if defendants must abandon their use of sex-based actuarial tables they must do so with regard to all of those in the pension program, not simply the instant plaintiff.

Consequently, class action status here would be in Judge Friendly's words "largely a formality." Where certification would be unduly burdensome either to the Court or to one of the parties, the Court should not acquiesce in such a formalism.

One valid aim of a class action may be to secure, in a single suit, numerous small damage claims. Although monetary relief incidental to the grant of an injunction and declaratory judgment may be awarded in a Rule 23(b)(2) class action, *Lynch v. Sperry Rand Corporation,* 62 F.R.D. 78, 85 (S.D.N.Y.1973), it does not seem appropriate here. Back payments would only fall due if unisex actuarial tables were used retroactively. And, such back payments would be owed only to those women who had received pensions when sex-based tables were in use.

Defendants divide participants in the pension program into two categories: "deferred annuitants," those who are presently contributing, and "immediate annuitants," those who have chosen an option and are receiving their retirement benefits. Spirt is a "deferred annuitant" having not yet retired. She is not yet the recipient of a pension and therefore would not be

entitled to back payments owed to those whose retirement benefits were computed pursuant to a discriminatory formula. Consequently, Spirt cannot represent a class of such persons and her action cannot be certified as a class action for purposes of monetary relief.

This is not to suggest that plaintiff as an individual lacks standing to seek injunctive and declaratory remedies to halt TIAA-CREF in their use of certain tables. In *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 94 (3d Cir. 1973), which challenged a private firm's pension plans, an active employee was found to have "a sufficient personal stake in the outcome of this case to assure that concrete adverseness will occur." Spirt's stake in the outcome, as a woman of 51 with vested rights in the program, is likewise sufficiently concrete so that she may press individually for a declaratory judgment and the grant of an injunction.

One further consideration militates against class action certification. Spirt purports to represent all the female participants in defendants' pension plans. These women are employed at many different institutions throughout the nation. The Court has determined that Spirt's employer, LIU, must be joined. If this suit were certified as a class action, logic would compel the conclusion that all the institutional participants in TIAA-CREF must be joined. Or, since Rule 19, Fed.R.Civ.P., is expressly "subject to the provisions of Rule 23," LIU could be saddled with the responsibility of being the class representative for all the institutions. Either alternative would be unduly burdensome to the Court and to the involuntary defendant University: neither would advance the litigation.

In summary, class action certification of Spirt's suit for an injunction and declaratory judgment would be a formality. She is not an appropriate class representative for the assertion of claims for incidental money damages. Moreover, the presence of LIU as a necessary party with its unavoidable implication that class action status would mandate joinder of scores of other institutions argues forcefully against certification.

IV. *Conclusion*

For the foregoing reasons, the Court denies plaintiff's motion for class action certification as well as defendants' motion for partial summary judgment. Defendants' motion to join certain parties is denied as to the male participants in the pension program and granted as to the plaintiff's employer, LIU. The Court directs that LIU be joined as a party pursuant to Rule 19(a), Fed.R.Civ.P., and plaintiff is given 30 days from the date of this decision to file an amended complaint joining LIU as a party defendant.

It is so ordered.

Opinion of the District Court dated August 9, 1979 and Opinion on Reargument dated September 12, 1979

DIANA L. SPIRT,

Plaintiff,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, and LONG ISLAND UNIVERSITY,

Defendants.

No. 74 Civ. 1674

United States District Court,
Southern District of New York

August 9, 1979

On Motion for Reargument September 12, 1979

OPINION

WARD, *District Judge.*

This is an action alleging sex discrimination in the operation of certain retirement annuity programs administered by defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF"). Plaintiff Diana L. Spirt ("Spirt"), a college professor who is required by her employer, defendant Long Island University ("LIU"), to participate in the TIAA and CREF plans, has moved for summary judgment, pursuant to Rule 56, Fed.R.Civ.P., alleging that the retirement annuity plans in question violate both the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII" or "the Act") and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants TIAA and CREF have cross-moved for summary

judgment.[1] For the reasons hereinafter stated, Spirt's motion is granted in part and denied in part; TIAA and CREF's cross-motion is granted as to TIAA and denied as to CREF.

The parties have submitted a detailed Stipulation of Facts which indicates the following: TIAA is a non-profit, legal reserve life insurance company, organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. It functions as a service organization, providing retirement and insurance plans for educational institutions and their staff members. Eligibility is limited to colleges, universities, independent schools, and certain other non-profit institutions that are engaged primarily in education or research. CREF is a companion non-profit corporation to TIAA with the same limited eligibility. The purpose of both TIAA and CREF is to offer educational institutions retirement and other benefit plans suited to the needs of their teaching staffs and other employees. The essential difference between the two corporations is that TIAA provides fixed dollar annuities, while CREF provides variable annuities.[2] Over 85 percent of all private four-year colleges and universities and over 40 percent of all public colleges and universities have adopted retirement plans managed by TIAA and CREF. In all, more than 450,000 employees of approximately 2,800 participating institutions are insured by the TIAA and CREF system.

LIU is one of the institutions which has adopted a retirement program for its employees managed by TIAA and CREF. Pursuant to a resolution of LIU's Board of Trustees, both the employee and the university contribute 5 percent of the first $4,800 of earnings; thereafter, the employee's contribution remains at 5 percent, and the institution contributes 11 per-

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1 Defendant LIU joins in neither motion. Rather, it "avers that it has always acted in good faith towards its male and female employees . . .," adopts a position of neutrality with respect to the issues before the Court, and "submits its rights and interests to the protection of [the] [C]ourt . . . ."

2 See footnote 4 *infra*.

cent. Participation in the plans by tenured professors at LIU, such as Spirt, is mandatory.

Plaintiff's claim of sex discrimination does not rest upon the contribution formula under the TIAA and CREF plans, which is identical for men and women. Rather, the asserted discrimination derives from TIAA and CREF's use of sex-segregated mortality tables in determining the benefits purchased with the contributions. These tables reflect the fact, that, taken as a group or class, women have a greater life expectancy than men. Based upon the uncontested rationale that women as a class will receive annuity payments for a longer period of time than men as a class, female participants in the plans receive smaller monthly payments than male participants of the same age, years in the plans, salary, and rate of contribution. Spirt contends that this discrimination violates Title VII and/or the Equal Protection Clause.

I. *Title VII*

A. The McCarran-Ferguson Act

TIAA and CREF first assert that application of Title VII to them in this case is barred by the McCarran-Ferguson Act ("the McCarran Act"), 15 U.S.C. § 1011 *et seq.*, which provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

Id. § 1012(b).

The McCarran Act was passed in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which, overruling *Paul v. Virginia*, 8 Wall. 168, 75 U.S. 168, 183, 19 L.Ed. 357 (1869), held that insurance transactions were subject to federal regulation under the Commerce Clause. The purpose of the statute was "broadly to give support to the

existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from [congressional] power" and by declaring continued state regulation of the business of insurance to be in the public interest.[3] *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429-30, 66 S.Ct. 1142, 1155, 90 L.Ed. 1342 (1946); *Accord, SEC v. National Securities, Inc.,* 393 U.S. 453, 458, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). The effect of the legislation was to make federal statutes inapplicable to the business of insurance, returning to the states the plenary regulatory power they had enjoyed prior to the *South-Eastern Underwriters* decision, unless (1) federal legislation specifically related to the business of insurance; or (2) the challenged activity by the defendant did not constitute the business of insurance; or (3) the state had not enacted any law for the purpose of regulating the business of insurance which would be invalidated, impaired, or superseded by application of the federal law. *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 218, 99 S.Ct. 1067, 1076 & nn. 16, 18, 59 L.Ed.2d 261 (1979); *SEC v. National Securities, Inc., supra,* 393 U.S. at 458-61, 89 S.Ct. 564; *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. at 429-30, 66 S.Ct. 1142; *Cochran v. Paco,* 606 F.2d 460, 464 (5th Cir. 1979); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.,* 408 F.2d 606, 611 (2d Cir. 1969); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.,* 326 F.2d 841, 844 (2d Cir. 1963), *cert. denied,* 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964).

Federal legislation is deemed to "specifically relate to the business of insurance" within the meaning of the McCarran

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3 In this regard, the statute contains the following "declaration of policy":

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

Act only if it contains an express indication to that effect. *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. at 429-30, 66 S.Ct. at 1155; *Cochran v. Paco, supra,* 606 F.2d at 464-465; *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.,* 291 F.Supp. 225, 230 (S.D.N.Y.1968), *aff'd,* 408 F.2d 606, 611 (2d Cir. 1969); *Ben v. General Motors Acceptance Corp.,* 374 F.Supp. 1199, 1201 (D.Colo. 1974); *Gerlach v. Allstate Ins. Co.,* 338 F.Supp. 642, 649 (S.D.Fla. 1972). The federal statute relied on here, Title VII, is a law of general applicability to employers in commerce with no explicit reference to insurance. *Compare* § 514(a) of ERISA, 29 U.S.C. § 1144(a), *discussed in Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). Thus, the supremacy of state regulation of the TIAA and CREF plans cannot be overridden on this basis.

The next consideration under McCarran Act analysis is whether the activities of defendants challenged by plaintiff constitute the "business of insurance." Although neither Congress nor the courts has defined the exact contours of the term, the general parameters were set by the Supreme Court in *SEC v. National Securities, Inc.,* 393 U.S. 453, 459-60, 89 S.Ct. 564, 569, 21 L.Ed.2d 668 (1969):

> Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v. National Casualty Co.,* 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. *Robertson v. California,* 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its

> reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

The activity challenged in the instant case—the use of sex-segregated mortality tables in the computation of annuity benefits—is an integral part of the relationship between the insurance company and the policyholder and specifically centers on the type of policy which can be issued. As such, it would appear to fall squarely within the "business of insurance" as defined by *National Securities*.

However, the Supreme Court has also interpreted the word "insurance" under the McCarran Act to require some *investment* risk-taking on the part of the insurance company. *SEC v. Variable Annuity Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959); *accord, Group Life & Health Ins. Co. v. Royal Drug Co., supra*, 99 S.Ct. at 1073-74. Thus, the Court has held that variable annuity companies, which assume only the risk of mortality but no investment risk[4] do not issue insurance within

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4 The Supreme Court has compared a variable annuity to the traditional fixed annuity as follows:

> While all the States regulate "annuities" under their "insurance" laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. The first variable annuity apparently appeared in this country about 1952 when New York created the College Retirement Equities Fund to provide annuities for teachers. It came into existence as a result of a search for a device that would

the meaning of the Act. *SEC v. Variable Annuity Co., supra,* 359 U.S. at 69-73, 79 S.Ct. 618. While TIAA offers fixed annuities which subject it to investment risk, CREF is a variable annuity company.[5] Under the rationale of *SEC v. Variable Annuity Co.*, therefore, it cannot be exempted from the dictates of Title VII as a result of state regulation of its policies. Consequently, the Court rejects this ground of CREF's motion for summary judgment.

Having met the first two conditions for supremacy of state regulation of the business of insurance, TIAA must still demonstrate that New York State has enacted a law for the purpose of regulating the business of insurance which would be invalidated, impaired, or superseded by the application of Title VII in the instant case. Plaintiff argues that New York State has

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> avoid paying annuitants in depreciated dollars. The theory was that returns from investments in common stocks would over the long run tend to compensate for the mounting inflation. The holder of a variable annuity cannot look forward to a fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. In some respects the variable annuity has the characteristics of the fixed and conventional annuity: payments are made periodically; they continue until the annuitant's death or in case other options are chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income; and the amounts vary according to age and sex of the annuitant. Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. That risk is an actuarial prognostication that a certain number of annuitants will survive to specified ages. Even if a substantial number live beyond their predicted demise, the company issuing the annuity—whether it be fixed or variable—is obligated to make the annuity payments on the basis of the mortality prediction reflected in the contract. This is the mortality risk assumed both by [issuers of variable annuities] and by those who issue fixed annuities.

SEC v. Variable Annuity Co., supra, 359 U.S. at 69-70, 79 S.Ct. at 621, (footnotes omitted).

5 In fact, the Supreme Court in *SEC v. Variable Annuity, supra,* makes explicit reference to CREF as the provider of the first variable annuity plan in the United States. 359 U.S. at 69, 79 S.Ct. 618, *quoted* in footnote 4 *supra.*

not regulated the question before the Court. The McCarran Act does not specify the extent to which a state must have regulated the business of insurance before application of a federal statute will be deemed to "invalidate, impair, or supersede" state law. However, this language has been judicially construed as satisfied whenever the state has either occupied the field of regulating the business of insurance or else has regulated the same general subject within the business of insurance as that potentially affected by the federal statute. *See Lowe v. Aarco-American, Inc.*, 536 F.2d 1160, 1162 (7th Cir. 1976); *Cochran v. Paco, Inc.*, 409 F.Supp. 219, 222 (N.D. Ga.1975), *rev'd on other grounds*, 606 F.2d 460 (5th Cir. 1979); *Ben v. General Motors Acceptance Corp., supra*, 374 F.Supp. at 1201; *Gerlach v. Allstate Ins. Co., supra*, 338 F.Supp. at 649-50.[6] This interpretation is supported by the legislative intent that, except as otherwise expressly provided, plenary power to regulate the business of insurance rests in the states. *SEC v. National Securities, Inc., supra*, 393 U.S. at 459-60, 89 S.Ct. 564; *Prudential Ins. Co. v. Benjamin, supra*, 328 U.S. at 429-30, 66 S.Ct. 1142; *Cochran v. Paco, Inc., supra*, 606 F.2d at 462-464.

In the instant case, New York has occupied the field of regulating the business of insurance through one of the most comprehensive insurance codes in the country. It has also pervasively regulated the subject of discrimination between

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6 This interpretation parallels that accorded the antitrust proviso to the statute which states that the Sherman Act, the Clayton Act and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). *See FTC v. National Casualty Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); *Crawford v. American Title Ins. Co.* 518 F.2d 217, 218-19 (5th Cir. 1975) (per curiam); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 83-84, 86 (10th Cir. 1973); *California League of Independent Ins. Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857, 860 (N.D.Cal.1959). Although cases construing the antitrust proviso are not dispositive of the issues presently before this Court, "they do serve as useful guides for construing the terms of the statute." *Cochran v. Paco, Inc., supra*, 606 F.2d at 463-464.

policyholders. For example, § 209 of the Insurance Law provides *inter alia* that no life insurance company doing business in the state shall make or permit any unfair discrimination between individuals of the same class and of equal expectation of life in premiums, rates, dividends or benefits of policies for life insurance or annuities. The restriction of § 209's proscription to discrimination between individuals of the same class evidences a legislative acceptance of discrimination between individuals based on their membership in classes or groups which, from an actuarial point of view, are known to present different insurance risks. Indeed, such risk classification is a concept fundamental to the operation of insurance systems. *The Supreme Court, 1977 Term*, 92 Harv.L.Rev. 57, 302 (1978); Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L.Rev. 624, 625-26 & nn. 9-10, 627 n.18, 653-54 (1973). Since defendants' use of sex-segregated mortality tables is based on the demonstrated difference in longevity between men as a class and women as a class, it is the type of discrimination contemplated by New York's regulatory scheme. Consequently, application of Title VII to enjoin the use of such tables by TIAA would invalidate, impair, or supersede New York law.

Other provisions of the New York Insurance Law not only regulate the subject of discrimination between policyholders, but also evidence a legislative belief that discrimination on the basis of sex in the rates and benefits of annuity contracts is not unlawful. For example, implicit in §§ 159(1)(d) and 160(c), which refer to remedies for misstatements of age and sex in annuity contracts, is the notion that New York views sex as a permissible factor in setting annuity rates and benefits. The same conclusion is suggested by a comparison of § 40(10) with § 40-e. The former section contains a sweeping prohibition of discrimination in "any . . . manner whatsoever" on account of race, color, creed, or national origin. By contrast, sex discrimination is subject to a separate, limited prohibition in § 40-e, which makes it unlawful for an insurer to refuse to issue or to cancel or decline to renew a policy on account of the

sex of the applicant. *See January 28, 1975 Opinion and Report Pursuant to Section 278 of the Insurance Law; News Memorandum re Chapter 564, issued by the Executive Chamber of the State of New York, August 4, 1975.*

The Court is persuaded on the basis of this evidence that New York State has regulated the business of insurance, including the subject of discrimination between policyholders, in a pervasive manner and that, within that comprehensive system of regulation, discrimination on the basis of sex in computing rates and benefits is considered to be permissible. Consequently, application of Title VII to TIAA in the instant case would invalidate, impair, or supersede New York law regulating the business of insurance. Accordingly, the Court holds that application of Title VII to TIAA in this case is precluded by the McCarran Act.[7]

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7 Spirt's additional arguments as to the inapplicability of the McCarran Act border on the frivolous. The Court finds nothing in *SEC v. Variable Annuity Co., supra*, or *Group Life & Health Ins. Co. v. Royal Drug Co., supra*, which supports plaintiff's argument that the McCarran Act's immunity from federal legislation applies only to such state regulation as was in existence at the time of the grant. Moreover, the Supreme Court's statement in *Prudential Ins. Co. v. Benjamin, supra*, that "Congress' purpose was broadly to give support to the existing *and future* state systems for regulating and taxing the business of insurance," 328 U.S. at 429, 66 S.Ct. at 1155 (emphasis added), makes clear that Spirt's interpretation of the case law construing the statute is erroneous. In any event, the Court believes that New York's regulation of insurance at the time the McCarran Act became effective was such as to be invalidated, impaired, or superseded by application of Title VII herein. Sections 159, 160 and 209, for example, were enacted in 1939, six years prior to the passage of the McCarran Act.

Plaintiff has also argued that the McCarran Act is an antitrust exemption statute, and that other newly enacted federal statutes preempt state statutory regulation of insurance unless the federal statute provides otherwise. The Court finds nothing in *Insurers' Action Council, Inc. v. Heaton*, 423 F.Supp. 921 (D.Minn.1976), or *Lowe v. Aarco-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976), cited by plaintiff or elsewhere which supports this view.

B. Title VII Procedural Prerequisites

TIAA[8] and CREF make the additional preliminary argument that plaintiff's Title VII claim must be dismissed because she has failed to comply with the statute's elaborate procedural requirements. Among the jurisdictional prerequisites to the maintenance of a civil action under Title VII is that the grievant have filed timely charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") and received from that agency a statutory notice of the right to sue. 42 U.S.C. § 2000e-5(a), (e), (f); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Silver v. Mohasco Corp.,* 602 F.2d 1083, 1085-1086 (2d Cir. 1979); *Weise v. Syracuse University,* 522 F.2d 397, 412 (2d Cir. 1975). When the alleged unlawful employment practice occurs within a state having a law prohibiting such a practice, an aggrieved person must also preliminarily seek relief from the relevant state authority. The EEOC may not act upon the charge until 60 days after state proceedings have been commenced, unless state proceedings have been terminated earlier. 42 U.S.C. § 2000e-5(c); *Love v. Pullman Co.,* 404 U.S. 522, 524-25, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); *Silver v. Mohasco Corp., supra,* 602 F.2d at 1085-1086; *Weise v. Syracuse University, supra,* 522 F.2d at 411.

In the instant case, Spirt filed her complaint commencing this action on April 14, 1974, prior to filing charges with either the EEOC or the New York State Division of Human Rights ("NYSDHR"), the state agency responsible for complaints alleging discrimination in employment on the basis of sex.[9] On October 25, 1974, she submitted a charge to the EEOC. By letter dated November 6, 1974, the EEOC informed plaintiff that her complaint had been forwarded to the NYSDHR and

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8 Although the Court has held that the McCarran Act bars application of Title VII to TIAA, it has indicated throughout this opinion additional arguments made by that defendant, since TIAA has argued for summary judgment on behalf of CREF as well as on its own behalf.

9 The applicable statute is New York's Human Rights Law, Executive Law § 290 *et seq.* (McKinney 1972 & 1978 Supp.).

asked plaintiff to "contact [the state agency] immediately to be certain that all requirements for commencing proceeding in your case have been met." A week later, by letter dated November 13, 1974, a Supervisor at the NYSDHR wrote to Spirt, confirming that her charge had been referred to that agency by the EEOC. In the letter, the Supervisor indicated that he had tried unsuccessfully to call Spirt and her attorney and asked that Spirt call him since, before he could proceed, he needed answers to several questions posed by her charge to the EEOC. Nevertheless, allegedly due at first to substantial delays in receipt of the letter and then to the Supervisor's failure to return Spirt's attorney's calls, the sixty day deferral period expired without either Spirt or her attorney's ever establishing communication with the Supervisor at the NYSDHR. Once the deferral period had elapsed, Spirt's attorney, believing that the procedural requirements of the statute had been satisfied, made no further efforts to contact the state agency. The EEOC also believed the deferral requirement satisfied after 60 days and as of that time considered Spirt's charge to have been formally filed with it. When 180 days passed after the date of formal filing without a disposition of Spirt's charge by the EEOC, her attorney requested and received from that agency a Right to Sue letter, closing the EEOC file and entitling Spirt to maintain a lawsuit on the charge. Upon receipt of the Right to Sue letter, plaintiff proceeded with the instant action.

TIAA and CREF argue that the jurisdictional prerequisites to the maintenance of this action have not been satisfied because Spirt commenced this lawsuit without recourse to either the EEOC or the NYSDHR. Defendants assert that this action is also jurisdictionally defective because plaintiff's attorney's delayed response to the November 13, 1974 letter deprived the NYSDHR of a bona fide opportunity to consider and act upon her complaint.

The first of these arguments has already been rejected by this Court in a prior opinion. *Spirt v. TIAA*, 416 F.Supp. 1019, 1020 (S.D.N.Y.1976).[10] The recent decision by the United

10 This Court's conclusion recently received additional support in *Oscar Mayer & Co. v. Evans*, ___ U.S. ___, 99 S.Ct. 2066, 60 L.Ed.2d 609

States Supreme Court in *Oscar Mayer & Co. v. Evans*, ____ U.S. ____, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), has made it clear beyond peradventure that defendants' second argument as to jurisdiction is also without merit. Indicating that the virtually identical language of § 14(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b) and § 706(b) of Title VII, 42 U.S.C. § 2000e-5(c), requiring a sixty-day period of deferral to state authorities were to be construed *in pari materia*, 99 S.Ct. at 2071, the Court interpreted the burden on the grievant under those sections as limited to the commencement of state proceedings by the filing of a written and signed statement of the facts upon which the proceeding is based. *Id.* at 2073-76. The Court recognized that such a statutory construction could conceivably permit grievants to avoid state intervention by failing to comply with state-imposed requirements, thereby frustrating the congressional intent that federal litigation be used as a last resort. *Id.* at 2075. Nevertheless, it interpreted the statutory language, which relates the proscription of further action only to the *commencement* of state proceedings[11] and which specifically excludes state-imposed requirements other than the filing of a

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(1979). There the Supreme Court ordered the federal district court to retain jurisdiction, holding the suit in abeyance, pending plaintiff's resort to the state agency. *Id.* 99 S.Ct. at 2076. The Court stated: "Suspension of proceedings is preferable to dismissal with leave to refile. . . .'To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' *Love v. Pullman Co.*, 404 U.S. 522, 526-527, 92 S.Ct. 616, 30 L.Ed. 2d 679 (1972) . . . . For this reason, suspension pending deferral is the preferred practice in the federal courts." 99 S.Ct. at 2076 n. 13 (citations omitted).

11 Section 706(b) of Title VII, proscribes further action by the EEOC

> before the expiration of sixty days after proceedings have been *commenced* under the State or local law, unless such proceedings have been earlier terminated . . . .

42 U.S.C. § 2000e-5(c) (emphasis added).

written and signed statement of the facts from the definition of "commencement,"[12] as indicative of a congressional intent that the failure to meet additional state procedural requirements not foreclose federal relief. *Id.* at 2073. The Court also found this statutory construction supported by the legislative purpose of merely giving state agencies a limited opportunity to settle grievances in a voluntary manner on the local level. *Id.* at 2074. *See also Silver v. Mohasco Corp., supra,* 602 F.2d at 1083; *Voutsis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972).

In the instant case, defendants do not dispute that plaintiff's charge with the EEOC, which included a copy of the complaint in this action, was referred to the NYSDHR by the EEOC, that the charge was received by that agency and that the EEOC deferred to the NYSDHR for 60 days. Regardless then of whether the NYSDHR had a sufficient opportunity to consider Spirt's grievance, it is clear under *Oscar Mayer* that the jurisdictional requirement of § 706(b) has been fulfilled.

C. The Merits

Turning to the substance of the Title VII claim, Spirt relies primarily[13] on § 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1), which provides:

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12 Section 706(b) continues:

> If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

42 U.S.C. § 2000e-5(c).

13 Spirt also claims that she is entitled to summary judgment under § 703(a)(2) of Title VII, which makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

> (a) It shall be an unlawful employment practice for an employer—
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> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

This section was construed by the Supreme Court in the context of an employee pension plan providing different terms for men and women in *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). *Manhart* struck down as violative of § 703(a)(1) an employer-operated pension fund which required women employees to contribute more than their male counterparts in order to receive equal periodic benefits upon retirement.

The Court found the plan unlawfully discriminatory although its differentiation in treatment was based upon the unquestionably accurate generalization that women as a class live longer than men as a class. Emphasizing that § 703(a)(1)'s proscription of discrimination with respect to compensation referred specifically to the "individual," the Court held that the section "precludes treatment of *individuals* as simply components of racial, religious, sexual or national class." 435 U.S. at 708, 98 S.Ct. at 1375. The Court recognized that unless women as a class made greater contributions to the plan, they would be subsidized by the class of male employees. However, it believed that the language of § 703(a)(1) evidenced Congress' judgment that fairness to individuals in matters of discrimination in employment covered by the statute were to take precedence over fairness to various classes affected thereby. *Id.* at 708-09, 98 S.Ct. 1370. It also found this construction consis-

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opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). However, inasmuch as the Court finds plaintiff's claim under § 703(a)(1) meritorious, it need not address this alternative basis for her Title VII action.

tent with the statutory goal of replacing "traditional assumptions about groups" with "thoughtful scrutiny of individuals," since a significant part of the longevity differential between men and women might well result from social factors rather than from innate biological characteristics. *Id.* at 709-10, 98 S.Ct. 1370. Finally, while recognizing that insurance is concerned with events that are individually unpredictable, the Court rejected the possibility that Congress intended a special definition of discrimination for employee group insurance plans. *Id.* at 710. The City of Los Angeles' plan was thus unlawful despite the validity of its general premise for the simple reason that many individual women would receive smaller paychecks than their corresponding male colleagues while working, but would live no longer than the men, thus receiving no compensating advantage during retirement.

The pension plans under attack in the instant case, like that involved in *Manhart*, differentiate in their treatment of women and men based on the fact that women participants as a class enjoy greater longevity than their male counterparts. However, because *individual* women will not live any longer than men who made the same contributions to the plans during their working years, but who receive larger monthly pension checks upon retirement, the program suffers from the same deficiency as the plan in *Manhart*.

TIAA and CREF maintain that *Manhart* does not control this case because here the differentiation in treatment of the sexes is in benefits, not in contributions. The Court, however, finds this distinction without significance. Section 703(a)(1) outlaws sex discrimination by employers with respect to "compensation." Justice Stevens' opinion for the majority in *Manhart* makes clear that both contributions and benefits constitute "compensation" within the meaning of the statute. 435 U.S. at 712 n. 23, 98 S.Ct. 1370. Thus, absent some affirmative justification, the discrimination against individual women in pension benefits involved in the instant case is as unlawful under § 703(a)(1) as the discrimination in contributions challenged in *Manhart*. Bernstein and Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's*

Dictum, 78 Colum.L.Rev. 1241, 1242 (1978); *1977 Supreme Court, supra*, 92 Harv.L.Rev. at 309.

D. Definition of "Employer" Under Title VII

The present case is also distinguishable from *Manhart*, TIAA and CREF assert, because it involves a retirement system administered by private insurance companies, not by the employer alone. It is their position that they cannot be held to have violated Title VII because § 703(a) covers only employer-operated pension plans.

The Court agrees that in most instances pension plans of private insurers will not be subject to the dictates of Title VII, since § 703(a) makes unlawful only discriminatory employment practices of an "employer." However, the term "employer" under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment. *See, e. g., Sibley Memorial Hospital v. Wilson*, 160 U.S.App.D.C. 14, 488 F.2d 1338 (1973); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F.Supp. 1089 (D.N.H.1974); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642 (M.D. N.C.1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975). *See also Manley v. Mobile County*, 441 F.Supp. 1351, 1355-56 (S.D.Ala.1977); *Curran v. Portland Superintending School Committee*, 435 F.Supp. 1063, 1072-73 (D.Me.1977).

Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent both that the Act's effectiveness not be frustrated by an employer's delegating authority for its employees' compensation, terms, conditions, or privileges of employment to third parties,[14] *see Manhart, supra*, 435 U.S. at 718 n. 33, 98 S.Ct. 1370, and that the Act be interpreted

14 This intent is evident in § 701(b) of the Act, which defines employer under Title VII to include "any agent" of a covered employer. 42 U.S.C. § 2000e(b).

liberally in order to achieve its remedial purpose of eradicating discrimination in employment.[15] *See, e. g., Silver v. Mohasco Corp., supra,* 602 F.2d at 1087; *Craig v. Department of Health, Education & Welfare,* 581 F.2d 189, 193 (8th Cir. 1978); *Bell v. Brown,* 181 U.S.App.D.C. 226, 230, 557 F.2d 849, 853 (1977); *Puntolillo, supra,* 375 F.Supp. at 1091-92.

Although in the present case LIU is plaintiff's employer in the usual sense, Spirt contends that TIAA and CREF have been delegated authority with respect to her pension plan sufficient to require them to share LIU's responsibility as "employer" for purposes of § 703(a)(1). The Court agrees. Educational institutions such as LIU have delegated their responsibility for and control over employee annuity plans to TIAA and CREF. To hold that discrimination in that aspect of employee compensation cannot be fully remedied under Title VII because of such delegation would impair the effectiveness of the Act. It is significant in the Court's view that TIAA and CREF are non-profit corporations whose sole reason for existence is to serve Spirt's direct employer, LIU, and other similar institutions by relieving them of the burden of establishing and administering their own insurance programs for their employees and that participation in TIAA and CREF is compulsory for plaintiff as a tenured professor at LIU. Thus, the instant case is a far cry from the situation implicitly sanctioned by *Manhart,* 435 U.S. at 717-18, 98 S.Ct. 1370, in which an employer has set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command

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15 As the United States Court of Appeals for the District of Columbia has aptly stated:

> To permit [a third party] to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Sibley Memorial Hospital v. Wilson, supra, 160 U.S.App.D.C. at 17, 21, 488 F.2d at 1341.

from any private insurer on the open market. *EEOC v. Colby College,* 589 F.2d 1139, 1146 (1st Cir. 1978) (Coffin, C. J., concurring); *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 309 n. 57. Under the circumstances of this case, the Court concludes that TIAA and CREF, as well as LIU, are employers within the meaning of Title VII and thus that CREF is liable along with the university[16] for any violation of § 703(a)(1).

E. Bennett Amendment

TIAA and CREF also claim that their annuity plans are not proscribed by Title VII by virtue of the Bennett Amendment, § 703(h) of the Act, 42 U.S.C. § 2000e-2(h). The Bennett Amendment provides that an employer's differentiation on the basis of sex in determining the wages or compensation paid to its employees will not violate Title VII if such differentiation is authorized by the Equal Pay Act, 29 U.S.C. § 206(d). The Equal Pay Act requires employers to pay men and women equal wages for equivalent work unless one of four specified exceptions is met. Defendants contend that the fourth exception, which authorizes a "differential based on any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), applies here

16 Neither LIU nor TIAA or CREF on its behalf has made the argument advanced by the defendant college in the analogous case of *EEOC v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), that the educational institution cannot be charged with a violation of Title VII because TIAA and CREF contract directly with individual faculty members. In any event, this Court agrees with the First Circuit that the college's or university's involvement in the overall program is sufficient to hold it responsible under the Act: As the Court observed in *Colby College,* "[The educational institution] is more than a broker, or other intermediary, that enables the parties to enter into the arrangement." *Id.* at 1141. The institution's adoption of the TIAA and CREF plans " 'constitutes affirmative, active participation,' without which 'the challenged program could not operate.' [The institution] requires participation in the plan for all eligible employees and the amount of premium payments is determined under a formula established by [it]." *Id., quoting Spirt v. TIAA,* 416 F.Supp. 1019, 1021, 1022 (S.D.N.Y.1976). The institution also materially assists TIAA and CREF by collecting the employees' contributions through salary deductions and forwarding the contributions to the insurers.

because the difference in benefits provided to men and women is based on the factor of longevity rather than sex.

Although this argument was expressly rejected by the Supreme Court in *Manhart*, 435 U.S. at 711-14, 98 S.Ct. 1370, defendants assert that *Manhart* does not control the present case because the plan there involved unequal employee contributions and equal benefits while the opposite is involved here. They appear to base this argument on the fact that the Wage and Hour Administrator's regulation, 29 C.F.R. § 800.116, while silent on the permissibility of different employee contribution rates accompanied by equal benefits, such as the plan in *Manhart* involved, expressly provides that either equal employer contributions or equal benefits will satisfy the dictates of the Equal Pay Act. 29 C.F.R. § 800.116(d) (1978). However, Justice Stevens' opinion makes clear that even assuming that 29 C.F.R. § 800.116 could be interpreted as sanctioning unequal employee contributions when accompanied by equal benefits, the Court found a conflicting regulation of the Administrator, 29 C.F.R. § 800.151[17] more persuasive. 435 U.S. at 714 n. 26, 98 S.Ct. 1370; *see EEOC v. Colby College, supra*, 589 F.2d at 1144 n. 9.

Moreover, in light of *Manhart*, the Administrator has proposed that 29 C.F.R. § 800.116(d) be amended so as to require that both employee contributions and benefits be equal under the Equal Pay Act. 43 Fed.Reg. 38,029 (1978). The Court thus finds the asserted distinction between *Manhart* and the present case without significance. As in *Manhart*, the record contains no evidence that any factor other than the employee's sex was taken into account in calculating the differentials in benefits received by men and women. Therefore, as in *Manhart*, "one cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor other than sex." Sex is exactly what it is based on.' " 435 U.S. at 712-13, 98 S.Ct. at 1377, 1378, *quoting Manhart v. City of Los Angeles*, 553 F.2d 581, 588

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17 That regulation condemns wage differentials based on the grouping of employees by sex for purposes of cost comparisons.

(1976). Accordingly, defendants have not established a defense based upon the Bennett Amendment.

F. Business Necessity

The Court is also unpersuaded by TIAA and CREF's argument that "business necessity" insulates them from what would otherwise be a Title VII violation. Assuming *arguendo* that the business necessity defense is applicable to practices which are facially discriminatory,[18] *but see 1977 Supreme Court,* 92 Harv.L.Rev. at 305 n. 37, the Court does not agree with TIAA and CREF that the sex distinctions drawn by them are "reasonably necessary to the normal operation" of their plans. *See Manhart, supra,* 435 U.S. at 716 n. 30, 98 S.Ct. 1370. Defendants emphasize that insurance deals with risks that cannot be evaluated for an individual, but which must be accurately predicted on a group basis to ensure financial reliability. The short answer to this argument is that the Court in *Manhart* made it clear that the impossibility of individual prediction could not justify resort to classifications proscribed by Title VII. *Id.* at 710, 98 S.Ct. 1370.

The insurance industry's reliance on the concept of equity also fails to legitimize the instant discrimination. In essence, TIAA and CREF contend that unless they are allowed to continue to use sex-segregated mortality tables, men will withdraw from defendants' programs and enroll in other plans which do not require them to assume more than their "actuarial share" of the annuity burden, resulting in TIAA and

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18 TIAA and CREF apparently ignore the fact that the instant case involves a practice that on its face discriminates against women in contending that plaintiff cannot establish a violation of Title VII because defendants did not intend to discriminate. Whatever argument can be made as to the necessity of proving intent to establish a prima facie violation of § 703(a)(1) when dealing with a facially neutral plan, *see Nashville Gas Co. v. Satty,* 434 U.S. 136, 144, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977), it is established that no intent need be shown where, as here, the practice in question on its face discriminates against women. *See Manhart, supra,* 435 U.S. at 716, 98 S.Ct. 1370.

CREF's eventual insolvency. The Court finds no support for this dire prediction. Since, as in *Manhart,* participation in the plans is generally mandatory, "an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market."[19] 435 U.S. at 716 n.30, 98 S.Ct. at 1379 n.30. That male participants would even consider an adjustment in benefits sufficient to warrant a change in plans seems particularly unlikely in the case of TIAA and CREF because their plans offer attractive features not generally available on the open market such as portability between employers and immediate vesting. Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 Colum.L.Rev. 1203, 1228, n. 94 (1974). The Court is also unconvinced that men would be likely to consider the equalization in treatment unfair: "The fundamental perception of equality with respect to compensation turns on the relative daily purchasing power of individual employees rather than the comparative actuarial estimates of a pension's total value. . . . After retirement, since the primary purpose of pensions is to ensure adequate cash flow to meet daily short term needs, the size of the monthly benefits would be the crucial element." *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 305.

Moreover, contrary to TIAA and CREF's prediction, the result in this case will not "revolutionize the insurance and pension industries." *Manhart, supra,* 435 U.S. at 717, 98 S.Ct. at 1380. It is important to note that although CREF's activities fall within Title VII's jurisdiction in this case, private insurance companies are exempt from the dictates of the Act unless they are both functioning as employers within the meaning of the statute and are engaged in conduct which does not constitute the business of insurance under the McCarran Act. More-

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19 Whether men could in fact obtain insurance at a lower price on the open market is questionable. Because of economies of scale, an individual usually cannot purchase insurance as cheaply alone as he can as a member of a group. *1977 Supreme Court, supra,* 92 Harv.L.Rev. at 310.

over, the Court believes that the formulation of appropriate relief can avoid drastic changes in the legal rules governing the plans, which TIAA and CREF contend would jeopardize their solvency and the insureds' benefits. Furthermore, nothing in this decision precludes consideration of the composition of the work force as a whole in determining the cost of defendants' annuity plans, *see Manhart, supra,* 435 U.S. at 718, 98 S.Ct. 1370, or the use of other risk classifications not proscribed by Title VII to ensure reliability and equity.

For the foregoing reasons, the Court concludes that CREF and LIU have violated § 703(a)(1) of Title VII. Accordingly, Spirt's motion for summary judgment is granted as to these defendants, and TIAA and CREF's cross-motion for summary judgment is denied with respect to CREF.

II. *Equal Protection*

Since the Court has concluded that TIAA is exempt from the dictates of Title VII by virtue of the McCarran Act, it must consider Spirt's alternative argument that defendants' use of sex-segregated mortality tables in the computation of annuity benefits denies her her Fourteenth Amendment right to equal protection of the laws in violation of 42 U.S.C. § 1983 and § 1985(3). While TIAA and CREF assert that there can be no equal protection violation here because defendants are private parties, and there is no state action, plaintiff takes the position that there is sufficient state involvement to bring this case within § 1983. Plaintiff further contends that even if there is no state action, defendants' conduct is proscribed by § 1985(3), which outlaws purely private conspiracies to violate constitutional rights.

§ 1983

To state a claim for relief under § 1983, plaintiff must establish that defendants have deprived her of a right secured by the Constitution or laws of the United States and that, in so doing, defendants acted under color of state law.[20] *Flagg*

20 42 U.S.C. § 1983 provides:

Brothers, Inc. v. Brooks, 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). The right relied on by Spirt is the Fourteenth Amendment guarantee of freedom from the denial by the state of the equal protection of the laws. Thus, Spirt must demonstrate both that defendants have acted under color of law and that their actions are properly attributable to the State of New York. *Id.* at 156, 98 S.Ct. 1729.

Although TIAA and CREF are private entities, Spirt alleges that their actions may be considered those of the state because, as insurance companies, their business involves substantial public interest and is the subject of substantial regulation by the State of New York. Plaintiff notes specifically that the New York Superintendent of Insurance is required to and does approve all TIAA contracts, CREF certificates and various other materials. The TIAA contracts as well as some of the other materials set forth the sex-segregated rate and mortality tables used by defendants to compute annuity benefits.

That a business is "affected with a public interest" does not suffice to convert its actions into those of the state for purposes of the Fourteenth Amendment. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353-54 & n. 9, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *see, e. g., Evans v. Newton*, 382 U.S. 296, 300, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966); *Civil Rights Cases*, 109 U.S. 3, 8, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Nor does the fact that the business is subject to extensive and detailed state regulation serve to transform its activities into governmental ones. *Jackson, supra*, 419 U.S. at 350, 95 S.Ct. 449; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

the latter may be fairly treated as that of State itself." *Jackson, supra,* 419 U.S. at 351, 95 S.Ct. at 453; *accord, Moose Lodge, supra,* 407 U.S. at 176-77, 92 S.Ct. 1965.

In *Jackson*, the Supreme Court held that a state utility commission's approval of the defendant utility company's tariff which set forth the company's right to terminate service for nonpayment without a hearing did not transmute the utility's termination practice into state action "where the commission has not put its own weight on the side of the . . . practice by *ordering* it." 419 U.S. at 357, 95 S.Ct. at 456-457 (emphasis added). Subsequent to *Jackson*, in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), the Supreme Court unequivocally pronounced that the acts of a private entity will not be attributed to the state unless the state actually *compels* the action. There, the plaintiffs challenged the defendant storage company's sale of their property without a prior hearing. Although a state statute specifically authorized the sale by the defendant, the Court held there was no state action because the state was in no way responsible for the private defendant's action, action which the state statute permitted, but did not compel. 436 U.S. at 165, 98 S.Ct. 1729. In the present case, there can be no claim that the State of New York has compelled TIAA and CREF to use sex-segregated mortality tables. Therefore, under the rationale of *Jackson* and *Flagg Brothers*, there is no state action.

It is arguable, however, that *Flagg Brothers* and *Jackson* do not control the instant case. This Circuit has held that state action analysis requires consideration of the nature of the right allegedly infringed as well as the extent of the state's involvement, *e. g., Taylor v. Consolidated Edison Co.*, 552 F.2d 39, 42 (2d Cir.), *cert. denied*, 434 U.S. 845, 98 S.Ct. 147, 54 L.Ed.2d 111 (1977); *Weise v. Syracuse University, supra*, 522 F.2d at 405-06; *Jackson v. Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1973), *cert. denied*, 420 U.S. 927, 95 S.Ct. 9124, 43 L.Ed.2d 397 (1975), and that when the conduct complained of is race or sex discrimination, less state involvement may be required to find state action than when other interests are at stake. *Weise v. Syracuse University, supra*, 522 F.2d at 405-06;

Jackson v. Statler Foundation, supra, 496 F.2d at 629, 635. Because *Jackson* and *Flagg Brothers* involved deprivations of the right to procedural due process, not class-based discrimination, it is thus arguable[21] that in the present case conduct short of state compulsion could be deemed to constitute state action.

Even in the context of race discrimination[22] by a heavily regulated business, however, the Supreme Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), made it clear that no state action will be

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21 Because the Court finds no state action in the present case even under a standard less stringent than that espoused in *Jackson* and *Flagg Brothers*, it need not decide whether such a less stringent standard actually governs the analysis herein. The Court notes, however, that it is at least questionable whether the Supreme Court would find *Jackson* and *Flagg Brothers* inapplicable to plaintiff's claim of sex discrimination, both because the high Court's decisions do not yet seem to have recognized that the degree of state involvement required to find state action is related to the right involved, *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 373-74, 95 S.Ct. 449 (Marshall, J., dissenting), and because Justice Rehnquist's majority opinion in *Flagg Brothers* seems to rely on the race discrimination cases of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), to support the necessity of a state mandate to find state action. *See* 436 U.S. at 164-65, 98 S.Ct. 1729.

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22 The Second Circuit has declined to decide whether sex discrimination should be equated to race discrimination for purposes of state action analysis, but has held that, like race discrimination, discrimination on account of sex requires less governmental involvement to find state action than was required in the college discipline cases of *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), and *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973). *Weise v. Syracuse University*, 522 F.2d 397, 406 (2d Cir. 1975). The strict scrutiny afforded on the merits in cases involving equal protection challenges to race discrimination, *e. g., Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), as compared to the intermediate level of scrutiny which has apparently been adopted in cases involving sex discrimination, *e.g., Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977), would suggest that somewhat more governmental involvement would be required to find state action in sex discrimination cases than in race discrimination cases. However, as set forth *infra*, the Court finds inadequate state involvement to constitute state action even under the more permissive standards arguably applicable to allegations of race discrimination.

found unless, at a minimum, it can be said that the state has fostered or encouraged the alleged discrimination. 407 U.S. at 175-77 & n. 3, 92 S.Ct. 1965. In the present case, the New York Insurance Department plays absolutely no part in establishing or enforcing defendants' use of sex-segregated mortality tables. Nor is there any suggestion that the New York statutes and regulations governing insurance are intended overtly or covertly to foster or encourage discrimination against women. Although the Superintendent of Insurance approved defendants' contracts and certificates, such action in no way indicates encouragement for particular terms therein, but merely constitutes a determination that the contracts and certificates are not unlawful. *See Reichardt v. Payne*, 396 F.Supp. 1010, 1015-16 (N.D.Cal.1975). Such an exercise of a choice allowed by state law where the initiative comes solely from the private party and not from the state is insufficient to constitute state action. Accordingly, Spirt fails to state a claim under § 1983.

§ 1985

Plaintiff appears to place more stock in her argument that defendants have engaged in a conspiracy to deprive her of her Fourteenth Amendment right to equal protection that, even absent state action, is actionable under 42 U.S.C. § 1985(3).[23]

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23 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one

This allegation is derived from *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 28 L.Ed.2d 338 (1971), in which the Supreme Court held that certain wholly private conspiracies to deprive persons of equal protection of the laws or equal privileges and immunities under the laws may be redressed under § 1985(3) if accompanied by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 101-02, 91 S.Ct. at 1798.

Griffin upheld a remedy under § 1985(3) for black citizens assaulted in the course of interstate travel on a public highway on the basis of section 2 of the Thirteenth Amendment which granted Congress the authority to create "a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action" intended to deprive them of their basic rights. *Id.* at 105, 91 S.Ct. at 1800. The Court based its holding alternatively on the right to interstate travel, a right and privilege of national citizenship assertable against private as well as state interference. *Id.* at 105-06, 91 S.Ct. 1790, *citing Shapiro v. Thompson*, 394 U.S. 618, 629-31, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *id.* at 642-44, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest*, 383 U.S. 745, 757-60 & n. 17, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); *Twining v. New Jersey*, 211 U.S. 78, 97, 29 S.Ct. 14, 53 L.Ed. 97 (1908); *Slaughter-House Cases*, 16 Wall. 36, 83 U.S. 36, 79-80, 21 L.Ed. 394 (1873); *Crandall v. Nevada*, 6 Wall. 35, 73 U.S. 35, 44, 48-49, 18 L.Ed. 744 (1868); *Passenger Cases*, 7 Haw. 283, 48 U.S. 283, 492, 12 L.Ed. 702 (1849) (Taney, C. J., dissenting).

In the instant case, Spirt does not allege a conspiracy to deprive her of her rights under the Thirteenth Amendment or her right to interstate travel. Rather she claims to be the victim

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or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

of a sex-based conspiracy[24] to deprive her of the right to equal protection of the laws under the Fourteenth Amendment. Whether § 1985(3) extends the Fourteenth Amendment's protections to private action is an issue left open by the Supreme Court in *Griffin*, 403 U.S. at 107, 91 S.Ct. 1790, and which has since divided the lower courts.[25] However, the question appears to have been recently resolved in *Great American Federal Savings & Loan Ass'n v. Novotny*, ___ U.S. ___, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). There the Supreme Court clearly stated that § 1985(3) creates no substantive rights, but is rather "a purely remedial statute, providing a civil cause of action when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section." 99 S.Ct. at 2349, 2351. By contrast to the right under the Thirteenth Amendment to be free from the incidents of slavery and the right to interstate travel, the federal right to equal protection under the Fourteenth Amendment relied on by plaintiff affords protection only against unequal treatment by the state. *Jackson v. Metropolitan Edison Co., supra*, 419 U.S.

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24 This Circuit has not reached the issue whether sex-based conspiracies have the requisite "class-based, invidiously discriminatory animus" demanded by *Griffin*. *Weise v. Syracuse University*, 522 F.2d 397, 408-09 n. 16 (2d Cir. 1975). However, the Third Circuit, in a persuasive opinion, has held that they do. *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243-44 & n. 36 (3d Cir. 1978) (en banc), *rev'd on other grounds*, ___ U.S. ___, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *accord, Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

25 *Compare Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974) (state action required); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (same); *and Weiss v. Willow Tree Civic Ass'n*, 467 F.Supp. 803 (S.D.N.Y. 1979) (same), *with Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (state action not required). *See also Weise v. Syracuse University, supra*, 522 F.2d at 401, 408 (error to dismiss for lack of state action § 1985(3) claim alleging conspiracy to deprive plaintiffs of equal protection of the laws); Frantz, *Congressional Power to Enforce the Fourteenth Amendment against Private Acts*, 73 Yale L.J. 1353 (1964); Note, *Federal Power to Regulate Private Discriminations: The Revival of the Reconstruction Era Amendments*, 74 Colum.L.Rev. 451, 516-17 (1974).

at 349, 95 S.Ct. 449; *Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172, 92 S.Ct. 1965; *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *see United Steelworkers of America v. Weber*, ___ U.S. ___, ___, 99 S.Ct. 2721, 61 L.Ed.2d 400 (1979). Thus, state action is an essential element of a § 1985(3) claim premised thereon. As Justice Stevens stated in his concurring opinion in *Novotny:*

> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment by state action. Private conspiracies to deprive individuals of these rights are, as this Court held in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, actionable under § 1985(c) without regard to any state involvement.
>
> Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161. If a state agency arbitrarily refuses to serve a class of persons—Chinese Americans, for example, see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220—it violates the Fourteenth Amendment. Or if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(c).
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> If, however, private persons engage in purely private acts of discrimination—for example, if they discriminate against women or against lawyers with a criminal practice, see *Dombrowski v. Dowling*, 459 F.2d 190, 194-196—they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Four-

> teenth Amendment are rights to protection against unequal or unfair treatment of the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation.

Id. 99 S.Ct. at 2354-55 (Stevens, J., concurring) (footnotes omitted).

In the present case, the Court has held that there is no state action. Consequently, Spirt cannot state a claim under 42 U.S.C. § 1985(3). Inasmuch as plaintiff has not established either a Title VII or Equal Protection violation by TIAA, her motion for summary judgment is denied as to that defendant. TIAA's cross-motion for summary judgment is granted.

III. *Relief*

The Court faces the task of framing a remedy that will eliminate CREF and LIU's unlawful discrimination against plaintiff while at the same time safeguarding the legal and equitable rights of others potentially affected by a decree and minimizing the financial dangers which could result from the restructuring of a major retirement program.

The Court's task is eased by the fact that Spirt is a "deferred annuitant," who has not yet begun to receive annuity benefits. The sex-based mortality tables which result in the instant violations of Title VII are not used by CREF until the date of retirement. Prior to that time, premium payments to CREF purchase "accumulation units," each unit representing a small share of participation in every investment in the CREF portfolio. The number of accumulation units purchased with each monthly payment varies depending on the current value of CREF's accumulation fund and the total number of accumulation units outstanding among all participants. At retirement, a participant's total accumulation units are converted into a

fixed number of "annuity units." The number of annuity units received is based essentially on the number of accumulation units owned by the participant, the type of annuity selected, and the life expectancy of the annuitant(s) calculated according to the mortality tables used by CREF. Under present practice, if a male and a female participant of the same age retire with the same number of accumulation units and they choose, for example, the same single life annuity, the woman will be allocated a smaller number of annuity units than the man (leading to smaller monthly benefits) because her life expectancy is deemed greater.

Because the number of annuity units to which Spirt is entitled has not yet been calculated, the Court believes that her rights can be adequately protected by the issuance of purely prospective relief. It therefore enjoins CREF from using sex-based mortality tables[26] in calculating the number of annuity units to which plaintiff and its other deferred annuitants are entitled.[27] The Court further enjoins LIU from both making contributions on behalf of its employees and from requiring its employees to contribute to any retirement plan that uses sex-based mortality tables in calculating periodic benefits.

The above remedy avoids the necessity of any retroactive payments or other increase in costs that might jeopardize the financial stability of the TIAA and CREF plans. *See generally*

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26 The Court includes within the term "sex-based mortality tables" mortality tables which use sex as one of the several demarcating factors in determining longevity. Although one commentator has suggested that Justice Stevens' opinion in *Manhart* is unclear as to whether such tables would pass muster under Title VII, *1977 Supreme Court, supra*, 92 Harv.L.Rev. at 310, the Court believes that any determination of rates or benefits based on such tables would also be unlawful as it would still result in discrimination between men and women who were alike in all relevant characteristics except sex. *See id.* at 310 & n. 61.

27 Although plaintiff's motion for class certification was denied by this Court, the decision was predicated in part on TIAA and CREF's acknowledgment that any relief would of necessity be class-oriented. 416 F.Supp. 1019, 1023-25 (S.D.N.Y.1976).

Manhart, supra, 435 U.S. at 718-23, 98 S.Ct. 1370; *Colby College, supra*, 589 F.2d at 1144-46. Moreover, since the only participants who need be affected are deferred annuitants such as Spirt, the relief ordered by the Court should also avoid any possible question of impairment of the contract rights of male participants,[28] *see Colby College, supra*, 589 F.2d at 1145, or violation of the Equal Pay Act.[29]

Compliance with the Court's decree may only require new mathematical computations based on currently available statistics. The Court is mindful, however, of the Supreme Court's admonition in *Manhart* as to "the difficulty of amending a major pension plan, a task that cannot be accomplished overnight." 435 U.S. at 719 n. 36, 98 S.Ct. at 1381 n. 36. It

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28 The CREF certificates do not promise that any particular mortality tables will be used in the calculation of the annuity units to which a participant is entitled. To the extent TIAA may choose voluntarily to abandon its use of sex-segregated mortality tables in order to qualify as a retirement plan that may be used by LIU, it too may do so without impairing the contract rights of male participants. Although the TIAA contracts provide that premiums will be applied to purchase annuities according to a rate schedule that currently incorporates sex-based mortality tables, the contracts also provide that TIAA may at any time substitute a new rate schedule applicable to subsequent premiums.

29 As previously noted, the Equal Pay Act forbids employers subject to its terms from paying men and women unequal wages for equivalent work. However, the statute specifically provides "[t]hat an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1). Based on this proviso, TIAA and CREF have contended that any relief which lowered the benefits of male participants would "reduce the wage rate of any employee" in violation of the Equal Pay Act. While the Court need not determine the validity of this argument in view of the relief ordered herein, it notes that defendants appear to presume without authority that the proviso is applicable to relief formulated to obtain compliance with Title VII as opposed to the Equal Pay Act. It also notes that whether retirement benefits are "wages" within the meaning of the Equal Pay Act is an open question which the Supreme Court has declined to resolve. *See Manhart, supra*, 435 U.S. at 712 n. 23, 98 S.Ct. 1370. *See also* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 Colum.L.Rev. 1203, 1225-26 (1974).

therefore stays enforcement of its decree until the termination of the 1979-80 academic year: CREF is directed to comply with the Court's order with regard to the computation of annuity units for all participants retiring on or after May 1, 1980; LIU is directed to comply with the Court's order with regard to all employment contracts becoming effective on or after June 1, 1980.

Settle order on notice.

OPINION ON MOTION FOR REARGUMENT

Defendant College Retirement Equities Fund ("CREF") moves for reargument pursuant to Rule 9(m) of the General Rules of this Court, claiming that there is an apparently inadvertent inconsistency between the stated purpose of the remedy set forth in the Court's Opinion dated August 9, 1979 ("the Opinion") and the actual effect of the relief granted. Specifically, CREF contends that the Court's order enjoining it from using sex-segregated mortality tables in the computation of retirement benefits ought to apply only to the calculation of annuity units based on contributions made starting May 1, 1980, rather than to all annuity units computed on or after that date. Otherwise, according to CREF, the remedy provided will, in contravention of the Court's stated purpose, have a retroactive impact and result in the violation of the legal and equitable rights of male deferred annuitants. Although the effect of the remedy granted was by no means inadvertent[1] and the Court hereby reaffirms its Opinion, it will nevertheless briefly indicate why it believes there is no inconsistency between its intended purpose and the relief ordered.

The Court's intention to avoid retroactive relief was based on the Supreme Court's cautioning in *Manhart* that the rules

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1 The Court finds CREF's suggestion that the Court reached its result inadvertently to be somewhat disingenuous inasmuch as CREF's argument concerning the effect of the relief granted by the Court is based primarily not on the sea of documents submitted to the Court on defendants' initiative, but rather on supplementary submissions *made at the request of the Court* shortly before its Opinion was filed.

applicable to pension funds found to have violated Title VII in good faith should generally not be applied retroactively, since requiring pension plans to make retroactive payments could jeopardize the insurer's solvency and ultimately the insureds' benefits. *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 720-22, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). However, in contrast to *Manhart*, where the lower courts had awarded payments to the entire class of female employees and retirees of the difference between male participants' past contributions to the pension fund and their own, *id.* at 718, 719 n.36, 98 S.Ct. 1370, the relief granted in the instant case will not involve any unanticipated payments by CREF which would force it to meet unchanged obligations with diminished assets. Rather, the relief granted in this case will merely vary the future allocation and distribution of an unaffected amount of assets. For this reason, the Court believes that the remedy it has fashioned does not involve impermissible retroactive relief within the meaning of *Manhart*.[2]

The Court also disagrees with CREF that the remedy it has ordered must be amended to avoid either a breach of contract or violation of the equitable rights of male deferred annuitants. CREF now for the first time points to four documents which it contends give deferred annuitants a contractual right, which CREF will have to breach to comply with this Court's order, to have the number of annuity units they will be awarded at the time of retirement calculated pursuant to an actuarial formula that will take into account their sex.[3] The

2 Retroactive relief within the meaning of *Manhart* would, in the Court's view, have been a relevant issue if this case had involved the rights not only of deferred annuitants such as Diana Spirt, but also of female retirees who had already received annuity checks smaller than those of their male counterparts and who sought to recover a money award for the difference in benefits heretofore provided.

3 Only one of these documents, the Report of Annuity Premiums and Benefits, was submitted by CREF in support of its and TIAA's motion and in opposition to plaintiff's cross-motion for summary judgment. Two of the remaining documents now relied on by CREF, the CREF certificate and the

Court, however, is not persuaded that any of these documents creates a contractual obligation by CREF to use sex-segregated mortality tables in computing benefits.[4] Moreover, even assuming such a promise by CREF, the fact of the matter is that this Court has held the computation of CREF benefits based on sex-segregated tables to be unlawful and has enjoined their use. Therefore, any possible action against CREF for breach of contract should be barred by the doctrine of impossibility of performance.[5] J. Calamari & J. Perillo, *Contracts* § 13-4, at 486-87 (2d ed. 1977).

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information pamphlet *CREF Units at Work*, were thereafter supplied to the Court only at its specific request. The fourth document, a single page from the pamphlet describing CREF's Rules for Determining Benefits, has been submitted to the Court for the first time in connection with the instant motion for reargument. While the Court finds nothing on this page persuasive, it could not, in any event, accept an argument based on a single page from this pamphlet, which clearly begins in the middle of one section and which appears to end in the middle of another. Furthermore, § 12 of the CREF certificate puts an end to any breach of contract argument premised on these Rules by providing that Rules "may [be] amend[ed] and add[ed] to . . . from time to time . . . ."

4 Of these four documents, the only one which the Court deems worthy of discussion is the CREF certificate. Although the certificate does state generally in § 7 that the number of annuity units on the Annuity Starting Date will depend on listed factors, including "the age and sex of the Participant, and in the case of a Survivor Unit-annuity, the age and sex of the Participant's spouse," in marked contrast to the TIAA contract it does not set forth a sex-segregated rate schedule or otherwise indicate in any way how the participant's sex will affect the benefits provided. Under all the circumstances, the Court does not believe that this general reference to sex as a factor in computing benefits can be reasonably interpreted as a promise on the part of CREF to accord an advantage in benefits to male participants based on the greater longevity of men as a class over women as a class.

5 CREF has argued that because the relief ordered by the Court would *inter alia* breach the contractual rights of male deferred annuitants, the remedy must be modified so as to limit the injunction against the use of sex-segregated mortality tables to the computation of annuity units based on contributions made to the plan starting May 1, 1980. If, however, as CREF has argued, it is already contractually committed to calculate annuity units according to sex-segregated mortality tables, the Court does not understand

Furthermore, the Court does not believe that its decree results in the inequitable treatment of male deferred annuitants. For the reasons set forth on page ____ of its Opinion, the Court simply does not credit CREF's argument that male participants have been induced to make contributions they otherwise would not have made to CREF based on the now-frustrated expectation that their sex would be taken into account in determining their future benefits. The unlikelihood of any such reliance is confirmed by a consideration of the general nature of participation in CREF which, unlike TIAA, involves assumption of risks by the participant, who knows that the benefits purchased by current contributions will be determined in the future based on a variety of variable factors, including possibly changed actuarial standards, which may leave him or her in a better or worse position than would be the case if the benefits were purchased immediately. Under all the circumstances, the Court cannot conclude that male deferred annuitants could have reasonably relied on CREF's use of sex-segregated mortality tables in computing their benefits to a degree that would justify prolonging the unlawful discrimination against female deferred annuitants found in this case.

The Court is also unpersuaded that the relief it has ordered contravenes the New York Insurance Law. CREF asserts that the New York statute contemplates that the difference in male and female life expectancies will be considered in computing individual annuity rates. However, as discussed at pages 1303-1304 and 1312-1313 of the Court's opinion, the New York Insurance Law does not require the use of sex-segregated tables, but merely finds their use to be permissible.[6]

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how banning the use of the subject tables with regard to benefits based on future contributions would avoid a breach of contract if enjoining their use as to benefits computed from past contributions would not.

6 Furthermore, even if the New York Insurance Law were inconsistent with the relief ordered by this Court to bring CREF into compliance with Title VII, such relief would still be permissible in view of the inapplicability of the McCarran-Ferguson Act to CREF in this case. *See generally* Opinion at 1301-1303.

Accordingly, for the foregoing reasons, defendant CREF's motion for reargument is denied.

It is so ordered.

Opinion of the District Court dated March 19, 1982

DIANA L. SPIRT, individually and on behalf of all others similarly situated,

Plaintiff,

—and—

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicants for Intervention,

—against—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, and LONG ISLAND UNIVERSITY,

Defendants,

—and—

ALBERT B. LEWIS, Superintendent of Insurance, Insurance Department, State of New York,

Supplemental Defendant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

—and—

DEBORAH MOSHOWITZ, SUSAN ALEXION, RENATA CLYNES, individually and on behalf of all others similarly situated, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and AMERICAN NURSES' ASSOCIATION,

Applicants for Intervention,

—against—

ALBERT B. LEWIS, individually and as Superintendent of Insurance, Insurance Department, State of New York, TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and DIANA L. SPIRT,

Defendants.

Nos. 74 Civ. 1674, 81 Civ. 881

United States District Court,
Southern District of New York

March 19, 1982

WARD, J.

BACKGROUND

The above-captioned actions both allege sex discrimination in the operation of certain retirement annuity plans administered by the Teachers Insurance and Annuity Association ("TIAA") and the College Retirement Equities Fund ("CREF"). Plaintiff in 74 Civ. 1674(RJW) (hereinafter "the *Spirt* action") is Diana L. Spirt, a professor at Long Island University ("LIU"). Spirt is required, as a condition of her employment by LIU, to participate in the TIAA and CREF retirement plans. Plaintiff in 81 Civ. 881(RJW) (hereinafter "the *Lewis* action") is the Equal Employment Opportunity Commission (the "EEOC"). TIAA, CREF, and LIU are named as defendants in the *Spirt* action. Albert B. Lewis, Superintendent of the New York State Department of Insurance ("Superintendent Lewis"), is the principal defendant in the *Lewis* action and is named as a supplemental defendant in the *Spirt* action. TIAA, CREF, LIU, and Spirt, plaintiff in the *Spirt* action, are named as defendants in the *Lewis* action on the theory that they have an interest in the outcome of the *Lewis*

action such that their joinder is required by Rule 19(a)(2), Fed. R. Civ. P.

The *Spirt* action has been the subject of three prior decisions of the Court. In an opinion filed on July 1, 1976 ("*Spirt I*"), the Court denied Spirt's motion for class certification, denied the joint motion of TIAA and CREF for partial summary judgment, and granted a TIAA-CREF motion to join LIU as a defendant. *See* 416 F. Supp. 1019. The Court filed a second opinion on August 9, 1979 ("*Spirt II*"), whereby Spirt's motion for summary judgment was granted in part and denied in part, TIAA's cross-motion for summary judgment was granted, and CREF's cross-motion for summary judgment was denied. *See* 475 F. Supp. 1298. In a third opinion, this one filed on September 12, 1979 ("*Spirt III*"), the Court denied CREF's motion for reargument of the decision rendered by the Court in *Spirt II*. *See* 475 F. Supp. 1316.

The Court assumes familiarity with its prior decisions in the *Spirt* action. In order to explain the present posture of the two actions that are the subjects of today's opinion, however, the Court must describe certain events that occurred after September 12, 1979, the date of *Spirt III*. On September 18, 1979, the Court entered a final judgment ("the *Spirt* judgment") based on its previous opinions in the *Spirt* action. Notices of appeal from this judgment were filed by TIAA and CREF on October 11, 1979, by LIU on October 12, 1979, and by Spirt on October 18, 1979. On January 8, 1980, the Court of Appeals, pursuant to a stipulation among the parties, ordered that the appeals be withdrawn from active consideration in order that this Court could supervise the settlement negotiations in which the parties were then engaging. Under this order, the Court of Appeals retained jurisdiction over the *Spirt* action.

In the course of the settlement negotiations, TIAA and CREF proposed to adopt tables that would eliminate sex-based differentiation in the benefits received by participants in the TIAA and CREF retirement plans on account of their *future* contributions to these plans. In December 1979, TIAA and CREF submitted a set of such "merged-gender mortality tables" ("Unisex I") to Superintendent Lewis for approval.

Superintendent Lewis approved Unisex I in February 1980. However, the EEOC informed TIAA and CREF that, for several reasons, it viewed Unisex I to violate both Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, and the Equal Pay Act of 1963 ("the Equal Pay Act"), 29 U.S.C. § 206(d).

Thereafter, TIAA, CREF, and the EEOC agreed to modify Unisex I in certain respects. On November 5, 1980, the EEOC issued an opinion letter stating that the revised tables ("Unisex II") would not, if adopted, violate Title VII or the Equal Pay Act. TIAA and CREF then submitted Unisex II to Superintendent Lewis for approval. In letters dated January 27, 1981, and February 5, 1981, Superintendent Lewis rejected Unisex II as to TIAA and CREF, respectively, on the ground that adoption of Unisex II would violate the New York Insurance Law.

TIAA and CREF then developed an entirely new plan with respect to future contributions ("Unisex III"), which plan also used merged-gender mortality tables. Unisex III was submitted to Superintendent Lewis for approval. On July 20, 1981, Superintendent Lewis approved Unisex III. However, the EEOC informed TIAA and CREF that it viewed Unisex III to be violative of both Title VII and the Equal Pay Act.

Meanwhile, on February 19, 1981, the Court of Appeals, pursuant to a stipulation among the parties, had ordered that the *Spirt* action be remanded to this Court for two purposes: (1) to permit TIAA and CREF to raise a particular Title VII defense, known as the "good-faith reliance defense," that they had not previously argued to this Court, and (2) to permit Spirt to seek leave to join Superintendent Lewis as a party in the *Spirt* action so that this Court might consider issues raised by Superintendent Lewis' refusal to approve Unisex II. In an order dated February 23, 1981, this Court, pursuant to another stipulation among the parties, granted Spirt leave to serve and file a supplemental complaint naming Superintendent Lewis as a defendant. These facially innocuous events caused a flood of motion papers to descend upon the Court over a period of some eight months, the total volume of which has been

duplicated by few, if any, of the hundreds of cases heard by this member of the Court during his ten years on the bench.

Spirt filed her supplemental complaint on February 23, 1981. On February 24, 1981, Spirt filed a motion, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment against Superintendent Lewis. TIAA and CREF cross-moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the supplemental complaint. Superintendent Lewis filed a memorandum with the Court wherein he opposed Spirt's motion for summary judgment and joined in the TIAA-CREF motion to dismiss. On March 30, 1981, TIAA and CREF moved, pursuant to Rule 60(b), Fed. R. Civ. P., for an order partially relieving CREF from the *Spirt* judgment. The latter TIAA-CREF motion is based on the "good-faith reliance defense" noted earlier. Spirt filed opposition to the TIAA-CREF cross-motion to dismiss her supplemental complaint, but has not filed opposition to the TIAA-CREF motion for partial relief from the *Spirt* judgment.

By this time, the new developments in the *Spirt* action had caught the attention of a number of persons and entities not parties in that litigation. On February 13, 1981, the EEOC filed the complaint in the *Lewis* action. An amended complaint was filed on March 13, 1981. The *Lewis* action seeks to enjoin Superintendent Lewis from applying the New York Insurance Law in a manner that the EEOC contends conflicts with the United States Constitution, Title VII, and the Equal Pay Act. Pursuant to Rule 15 of the Rules for the Division of Business Among District Judges of the Southern District of New York, the *Lewis* action was assigned to this member of the Court as "related" to the *Spirt* action. The EEOC then moved, in both the *Spirt* action and the *Lewis* action, for an order, pursuant to Rule 42(a), Fed. R. Civ. P., consolidating the *Spirt* action and the *Lewis* action. By a motion filed May 21, 1981, the EEOC moved, pursuant to Rule 24, Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action.

In a notice of motion filed April 21, 1981, Deborah Moshowitz, Susan Alexion, and Renata Clynes moved, pursuant to Rule 24, Fed. R. Civ. P., for leave to intervene in the *Lewis*

action as plaintiffs on behalf of themselves and all others similarly situated. In a separate notice of motion, these three individuals moved for an order granting them leave to participate in the proceedings before the Court in the *Spirt* action as *amici curiae*. The Court granted the latter motion on December 23, 1981. Moshowitz, Alexion, and Clynes have also joined in the motions for consolidation filed by the EEOC in the *Spirt* action and the *Lewis* action. For its part, the EEOC has joined in the Moshowitz-Alexion-Clynes motion for leave to intervene in the *Lewis* action.

The American Association of University Professors ("the AAUP") filed two motions, one on May 12, 1981, and one on July 9, 1981. The first of these motions sought an order, pursuant to Rule 24, Fed. R. Civ. P., granting the AAUP leave to intervene in the *Lewis* action. The second motion sought a similar order granting the AAUP leave to intervene in the *Spirt* action.

During the spring and summer months of 1981, briefs and affidavits in support of or in opposition to the above-described motions were filed with the Court on an almost daily basis. The Court heard nearly two days of oral argument on these motions. On July 16, 1981, the Court informed counsel that it would accept no submissions on the then-pending motions after August 6, 1981. Six days later, the EEOC moved for summary judgment against Superintendent Lewis in both the *Spirt* action and the *Lewis* action. The Court, concerned that these motions would trigger another round of brief writing by the various interested parties, which would further delay the Court's decision of the motions already pending before it, and aware that the motion filed in the *Spirt* action would have to be denied if the EEOC were not granted leave to intervene in that action, determined to adjourn the EEOC's summary judgment motions until after the date of the Court's decision on the previously filed motions.

On August 12, 1981, the American Nurses' Association ("the ANA"), filed a motion, pursuant to Rule 24, Fed. R. Civ. P., seeking leave to intervene in the *Lewis* action. Given the similarity of this motion to others that had already been filed

and fully briefed, the Court determined not to adjourn it in similar fashion to the EEOC's summary judgment motions. On December 11, 1981, Moshowitz, Alexion, and Clynes, applicants for intervention in the *Lewis* action, moved for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., against Superintendent Lewis in the *Lewis* action. Since this motion is substantially similar to the summary judgment motions filed by the EEOC in both the *Spirt* action and the *Lewis* action, and since it would be rendered moot if Moshowitz, Clynes, and Alexion were not granted leave to intervene in the *Lewis* action, the Court determined that this motion should, in identical fashion to the EEOC's summary judgment motions, be adjourned until after the date of the Court's decision on the previously filed motions.

By today's opinion, the Court decides all of the motions that have been filed in the *Spirt* action and the *Lewis* action except for the summary judgment motion filed by the EEOC in the *Lewis* action. For the reasons stated in the discussion that follows, the EEOC's motion for leave to intervene in the *Spirt* action is granted in part and denied in part, the EEOC's motion in the *Spirt* action for summary judgment against Superintendent Lewis is denied, the EEOC's motions to consolidate the *Spirt* action and the *Lewis* action are denied, the Moshowitz-Alexion-Clynes motion for leave to intervene in the *Lewis* action is denied, the Moshowitz-Alexion-Clynes motion in the *Lewis* action for summary judgment against Superintendent Lewis is denied, the AAUP's motion for leave to intervene in the *Lewis* action is denied, the ANA's motion for leave to intervene in the *Lewis* action is denied, the AAUP's motion for leave to intervene in the *Spirt* action is granted in part and denied in part, Spirt's motion for summary judgment against Superintendent Lewis is denied, the TIAA-CREF motion to dismiss Spirt's supplemental complaint is granted, and the TIAA-CREF motion for partial relief from the *Spirt* judgment is denied.

DISCUSSION

The Court has determined to discuss the motions that are the subject of today's opinion in the following sequence. First, the Court deals with the EEOC's motions to consolidate and the various motions to intervene filed by the EEOC, the AAUP, Moshowitz, Alexion, Clynes, and the ANA. Second, the Court discusses Spirt's motion for summary judgment against Superintendent Lewis and the TIAA-CREF cross-motion to dismiss Spirt's supplemental complaint. Third, the Court deals with the TIAA-CREF motion for partial relief from the *Spirt* judgment.

I. Motions to Intervene and Motions to Consolidate

While the various motions to intervene filed in the *Spirt* action and the *Lewis* action turn on some of the same questions, many of these motions are sufficiently distinct from the others that they must be analyzed separately from the others. Since the intervention motions, considered *in toto*, seek leave to intervene under Rules 24(a)(1), 24(a)(2), 24(b)(1), and 24(b)(2), Fed. R. Civ. P., analysis of these motions takes the Court into a necessarily lengthy, and possibly unprecedented, excursion into the entire parameters of Rule 24 of the Federal Rules of Civil Procedure. The EEOC motions to consolidate the *Spirt* action and the *Lewis* action must, in turn, be considered separately from all the intervention motions. The Court has organized its discussion of these motions as follows: (A) the EEOC motion to intervene in the *Spirt* action; (B) the EEOC motions to consolidate the *Spirt* action and the *Lewis* action; (C) the Moshowitz-Alexion-Clynes, AAUP, and ANA motions to intervene in the *Lewis* action; and (D) the AAUP motion to intervene in the *Spirt* action.

A. The EEOC Motion to Intervene in the Spirt *Action*

The EEOC has moved, pursuant to Rule 24(b)(1), Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action. The EEOC's desire to intervene in the *Spirt* action is based on

the failure of Spirt, plaintiff in the *Spirt* action, to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment. In the EEOC's view, the TIAA-CREF motion is based on an incorrect legal premise. Given that the *Spirt* action is not a class action, *see Spirt I, supra*, 416 F. Supp. at 1025, meaning that the Court has no obligation under Rule 23(e), Fed. R. Civ. P., the EEOC argues that the Court will have no choice but to endorse the allegedly incorrect legal premise that underpins the TIAA-CREF motion (by granting the TIAA-CREF motion as unopposed) unless the EEOC is permitted to intervene as a plaintiff in the *Spirt* action in order to oppose the TIAA-CREF motion. However, notwithstanding its rather narrow reason for seeking to intervene in the *Spirt* action, the EEOC's intervention motion seeks an order under which the EEOC (1) would not be bound by the *Spirt* judgment or by any findings of fact or conclusions of law previously made in the *Spirt* action, and (2) would be permitted to file a complaint alleging that TIAA has violated Title VII, notwithstanding the fact that the Court specifically held in *Spirt II* that "application of Title VII to TIAA in this case is precluded by the McCarran Act." 475 F.Supp. at 1304.

Under Rule 24(b)(1), "[u]pon timely application anyone may be permitted to intervene in an action . . . when a statute of the United States confers a conditional right to intervene." Such a conditional right is conferred upon the EEOC by Title VII, which provides that, "[u]pon timely application, the court may, in its discretion, permit the [EEOC] . . . to intervene in [a civil action brought under Title VII by a person claiming to be aggrieved by a violation of Title VII] upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). In a statement filed with the Court, the EEOC has certified that the *Spirt* action is a case of "general public importance." Thus, the EEOC's motion for leave to intervene in the *Spirt* action under Rule 24(b)(1) should be granted if (1) the EEOC's application to intervene was "timely" filed within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24; and (2) the circumstances of the *Spirt* action are such that the Court is inclined to exercise its discretionary power to issue an order

granting the EEOC leave to intervene in the *Spirt* action. *See Women's Committee for Equal Employment Opportunity* v. *National Broadcasting Co.*, 71 F.R.D. 666, 671-72 (S.D. N.Y.1976).

The Court begins by analyzing whether the EEOC has made a sufficient showing to satisfy the second of the two requirements set forth above. In determining whether to exercise its discretion to permit a Rule 24(b)(1) intervention, the trial court must consider whether the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties to the action, *see* Rule 24(b), Fed. R. Civ. P., and be attentive to the principle that "[d]istrict courts should not be niggardly in allowing a government agency to intervene in cases involving a statute it is required to enforce; indeed, a hospitable attitude is appropriate," *see Blowers* v. *Lawyers Co-operative Publishing Co.*, 527 F.2d 333, 334 (2d Cir. 1975) (per curiam); *Sobel* v. *Yeshiva University*, 438 F. Supp. 625, 627 (S.D.N.Y. 1977). Given that the EEOC does not propose to be bound by the Court's decision in *Spirt II*, and that the EEOC's proposed complaint seeks legal relief that the Court denied Spirt in *Spirt II* by awarding summary judgment in favor of TIAA, it is apparent that an order allowing the broad intervention sought by the EEOC's motion would open the door to the relitigation of *Spirt II* and hence would severely threaten both to delay and to prejudice adjudication of the rights of the original parties to the *Spirt* action. Since such a broad order is in no way necessitated by the reason advanced by the EEOC in favor of granting it leave to intervene, namely, the EEOC's desire to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court is convinced that the issuance of such an order would be an improper exercise of its discretion under Rule 24(b)(1).

The Court observes, however, that there is ample authority for a district court faced with a Rule 24(b)(1) motion to impose conditions on its grant of intervention. *See Ionian Shipping Co.* v. *British Law Insurance Co.*, 426 F.2d 186, 191-92 (2d Cir. 1970); 3B *Moore's Federal Practice* ¶ 24.10[4], at 24-396 (2d ed. 1981); 7A C. Wright & A. Miller, *Federal Practice and*

Procedure § 1922, at 623-24 (1972). Specifically, the trial court may condition the grant of a motion for leave to intervene by requiring the intervenor to abide by the court's previous decisions, *see, e.g., Fox* v. *Glickman Corp.*, 355 F.2d 161, 164 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966), or by limiting the issues that the intervenor is permitted to contest, *see, e.g., Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980); *Carroll* v. *American Federation of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963). For several reasons, the Court believes that it would be properly exercising its discretion under Rule 24(b)(1) were it to grant the EEOC leave to intervene in the *Spirt* action solely for the purpose of contesting the issue raised by TIAA-CREF motion for partial relief from the *Spirt* judgment. First, since the parties in the *Spirt* action agree that the Court has never decided the issue raised by the TIAA-CREF motion for relief from judgment, and since the Court decides that issue by today's opinion, the Court does not believe that the parties to the *Spirt* action would be threatened with undue delay in or prejudice to the adjudication of their rights were the EEOC granted leave to intervene as a plaintiff in the *Spirt* action with respect to this one issue. Second, such a limited intervention would, in the Court's view, fully respond to the EEOC's purported "need" to intervene in the *Spirt* action.[1]

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1 The Court recognizes that TIAA and CREF reject the EEOC's proposition that, given Spirt's failure to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court will be unable to deny that motion unless the EEOC becomes a party to the *Spirt* action and files opposition to the TIAA-CREF motion. Indeed, the Court is frank to say that it has some doubts concerning the putative "need" for EEOC intervention in the *Spirt* action. Were the Court to grant the TIAA-CREF motion as unopposed, this decision would not be an adjudication of the legal issues raised by the motion, and thus would not prejudice the EEOC, as *stare decisis* or on any other theory, with respect to other cases presently being litigated by the EEOC. Further, while counsel for Spirt has filed no formal opposition to the TIAA-CREF motion, the fact is that, at oral argument of this motion, counsel for Spirt and counsel for TIAA and CREF disagreed on the proper disposition of the TIAA-CREF motion. Transcript, June 2, 1981, at 214. Under the principles set forth by the Court in part II of today's

Notwithstanding the foregoing, the Court may not permit the EEOC to intervene in the *Spirt* action, even in this limited manner, if the EEOC's motion to intervene was not "timely" filed within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24. Generally, the timeliness of an application for intervention under Rule 24 is a question addressed to the sound discretion of the trial court, to be decided by reference to all the relevant circumstances. *United States* v. *International Business Machines Corp.*, 62 F.R.D. 530, 541 (S.D.N.Y. 1974). Specifically, whether a motion to intervene has been "timely" filed is to be judged not merely by the calendar, but also by reference to (1) the purpose for which intervention is sought, (2) the length of time the applicant for intervention knew of its interest in the suit before moving for leave to intervene, and (3) whether the requested intervention will delay the litigation or prejudice a party to the action. *See Michigan Association for Retarded Citizens* v. *Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *Carey* v.

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opinion, then, there is sufficient adversity between Spirt on the one hand and TIAA and CREF on the other with respect to the TIAA-CREF motion to make the legal issue raised by the TIAA-CREF motion justiciable in the *Spirt* action even if the EEOC were not a party to the *Spirt* action.

Unfortunately for TIAA and CREF, there is no authority for the proposition that the EEOC must demonstrate a need for intervention in order to succeed on a Rule 24(b)(1) motion. *Meyer* v. *Macmillan Publishing Co.*, 85 F.R.D. 149, 150 (S.D.N.Y. 1980). Thus, even if TIAA and CREF were correct that the EEOC has failed to articulate any real need to become a party to the *Spirt* action, this fact would not by itself control the Court's decision of the EEOC's motion to intervene, but would be one of several factors relevant to the Court's decision whether to exercise its discretion under Rule 24(b)(1). In fact, the EEOC has, by pointing out that its position with respect to the TIAA-CREF motion differs from that advanced by TIAA and CREF and also from that advanced by Spirt, demonstrated a real, if not compelling, need for its limited participation in the *Spirt* action. Even if this need did not exist, however, the failure of any party to the *Spirt* action to show that delay or prejudice would flow from the limited intervention contemplated by the Court, when coupled with the judicial deference that should be given to the EEOC's decision that the *Spirt* action warrants the allocation of its limited resources, *see id.* at 150-51, would incline the Court to believe that its discretion would best be exercised by allowing the EEOC to intervene with respect to the issue raised by the TIAA-CREF motion.

Klutznick, 88 F.R.D. 249, 250 (S.D.N.Y. 1980); *Evans* v. *Lynn*, 376 F. Supp. 327, 330 (S.D.N.Y. 1974), *aff'd en banc*, 537 F.2d 589 (2d Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521, 524 (S.D.N.Y. 1971).

Not surprisingly, in light of the delay and prejudice that the grant of *post-judgment* intervention typically creates, the courts of this Circuit are not normally inclined to find such motions to have been "timely" made. *See, e.g., Crown Financial Corp.* v. *Winthrop Lawrence Corp.*, 531 F.2d 76, 77 (2d Cir. 1976) (per curiam); *Firebird Society of New Haven, Inc.* v. *New Haven Board of Fire Commissioners*, 66 F.R.D. 457, 464-65 (D. Conn.), *aff'd mem.*, 515 F.2d 504 (2d Cir.), *cert. denied*, 423 U.S. 867 (1975). Nevertheless, it is beyond peradventure that post-judgment intervention motions are, in certain circumstances, "timely," *see, e.g., United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 396 (1977), and that such circumstances may be presented where, as is the case here, intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment, *see Hodgson* v. *United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972). Where post-judgment intervention is sought in order to participate in the relief or appellate phases of a litigation, the "timeliness" of the application to intervene must be determined by asking whether, in view of all the circumstances, the intervenor acted promptly after the entry of the judgment. *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 395-96. Here, the parties to the *Spirt* action agree that the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment was not presented to the Court prior to the commencement of the appeals from that judgment. Once the *Spirt* judgment was on appeal, the EEOC plainly could not have addressed a motion to intervene in the *Spirt* action to this Court. *See Rolle* v. *New York City Housing Authority*, 294 F. Supp. 574, 576 (S.D.N.Y. 1969). Thus, the EEOC's opportunity to seek leave to intervene in the *Spirt* action with respect to the issue raised by the TIAA-CREF motion for relief from

judgment first arose when the Court of Appeals remanded the *Spirt* action to this Court in order that TIAA and CREF might file a motion raising that issue. The EEOC moved to intervene less than two months after the TIAA-CREF motion was filed. As previously noted, the litigation of the *Spirt* action would not be delayed by allowing the EEOC to intervene to contest the issue raised by the TIAA-CREF motion for relief from judgment; further, no party to the *Spirt* action would be prejudiced by such a limited intervention. On the basis of all these circumstances, the Court finds that, insofar as the issue raised by the TIAA-CREF motion for relief from judgment is concerned, the EEOC moved to intervene "promptly" after entry of the *Spirt* judgment. The Court therefore holds that the EEOC's application for intervention was "timely" filed, within the meaning of 42 U.S.C. § 2000e-5(f)(1) and Rule 24, Fed. R. Civ. P., to the extent the EEOC seeks leave to intervene in order to oppose that motion.[2]

Accordingly, the EEOC's motion pursuant to Rule 24(b)(1), Fed. R. Civ. P., for leave to intervene in the *Spirt* action is

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2 The Court observes that, even if it were inclined to exercise its discretion to allow the EEOC to intervene in the *Spirt* action for any other purpose than to oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment, it would be precluded from doing so by virtue of the fact that the EEOC's application to intervene was not timely filed insofar as it seeks an order granting the EEOC leave to intervene in the *Spirt* action for such other purposes. The EEOC moved to intervene approximately seven years after the *Spirt* action was commenced and approximately two years after a final judgment was entered in the *Spirt* action. With the exception of the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment, the EEOC has known of the issues raised by the *Spirt* action throughout the pendency of the *Spirt* action. Allowance of the broad intervention sought by the EEOC would delay adjudication of and prejudice the existing parties to the *Spirt* action in the fashion described by the Court in text *supra*. Under these circumstances, the principles recited in text *supra* would require the Court to conclude, were it to reach the question, that the EEOC's application to intervene in the *Spirt* action was not "timely" filed, within the meaning of Rule 24, Fed. R. Civ. P., to the extent the EEOC seeks leave to intervene with respect to issues other than the one raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment.

granted in part and denied in part. The EEOC is granted leave to intervene as a plaintiff in the *Spirt* action only for the purpose of contesting the TIAA-CREF motion for partial relief from the *Spirt* judgment. With respect to the other issues pending before the Court in the *Spirt* action, the EEOC shall have leave to participate in the *Spirt* action as an *amicus curiae*. *See Blowers* v. *Lawyers Co-operative Publishing Co., supra*, 527 F.2d at 334. Since it has been denied leave to intervene in the *Spirt* action with respect to any issue involving Superintendent Lewis, the EEOC's motion in the *Spirt* action for summary judgment against Superintendent Lewis is denied.

B. The EEOC Motions to Consolidate the Spirt *Action and the* Lewis *Action*

The EEOC has moved, in both the *Spirt* action and the *Lewis* action, for an order consolidating the *Spirt* action and the *Lewis* action pursuant to Rule 42(a), Fed. R. Civ. P. Moshowitz, Alexion, and Clynes have, notwithstanding the fact that they are not parties to either action, joined in those motions. The EEOC seeks, by its motions to consolidate, to have the *Spirt* action and the *Lewis* action consolidated for all purposes. Memorandum of Points and Authorities in Support of Motion of Equal Employment Opportunity Commission to Consolidate, May 4, 1981, at 2.

Under Rule 42(a), a trial court may, "[w]hen actions involving a common question of law or fact are pending before [it]," "order [that] all the actions [be] consolidated." Thus, an order of consolidation such as the EEOC seeks here is only permissible (1) if the actions in question involve a common question of law or fact, *see Flintkote Co.* v. *Allis-Chalmers Corp.*, 73 F.R.D. 463, 464-65 (S.D.N.Y. 1977), and (2) if the court to which the consolidation motion is addressed has jurisdiction for all purposes over each of the actions in question, *see In re Penn Central Commercial Paper Litigation*, 62 F.R.D. 341, 344 (S.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 505 (2d Cir. 1975). Even if this standard is met, the decision whether to order consolidation is still left to the discretion of the trial court. *Jamroz* v. Blum, 509 F. Supp. 953, 956 (N.D.N.Y. 1981). In determining

whether consolidation is proper, the trial court must weigh the prospective benefits of consolidation, in terms of convenience to the parties and judicial economy, against the extent of any confusion, delay, or prejudice that might result from consolidation. *Tucker* v. *Arthur Andersen & Co.*, 73 F.R.D. 316, 317 (S.D.N.Y. 1976). The party seeking consolidation has the burden of persuading the trial court that the balance of these considerations tips in favor of consolidation. *Transeastern Shipping Corp.* v. *India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971).

In light of the foregoing principles, the Court finds that it may not properly order the consolidation that the EEOC seeks here. As noted, the *Spirt* action is before this Court on a limited remand from the Court of Appeals for this Circuit. Since this Court does not have jurisdiction over the *Spirt* action for all purposes, this Court may not permissibly order consolidation of the *Lewis* action and the *Spirt* action for all purposes. Even if the Court *could* issue such an order, the EEOC has failed to persuade the Court that an order consolidating the *Spirt* action and the *Lewis* action for all purposes would be a sound exercise of its discretion. The two actions may indeed present a common issue of law: whether Superintendent Lewis violated Title VII by refusing to approve Unisex II. However, as the Court holds in part II of today's opinion, this issue is not justiciable in the context of the *Spirt* action. There consequently can be no doubt that an order consolidating these two actions for all purposes would, by making the issue of Superintendent Lewis' liability under Title VII justiciable in the *Spirt* action, threaten to delay final adjudication of the *Spirt* action, to prejudice the original parties to the *Spirt* action, and to create confusion in the subsequent litigation of both the *Spirt* action and the *Lewis* action. Further, since the Court's holding that the issue of Superintendent Lewis' liability under Title VII is not justiciable in the *Spirt* action does not prejudice the EEOC's ability to litigate this issue in the *Lewis* action, the EEOC is not prejudiced by being denied an opportunity to litigate this issue in the *Spirt* action. Accordingly, the Court denies the EEOC's motions, filed in both the *Spirt*

action and the *Lewis* action, for an order consolidating these two actions pursuant to Rule 42(a), Fed. R. Civ. P.

C. The Moshowitz-Alexion-Clynes, AAUP, and ANA Motions to Intervene in the Lewis *Action*

Moshowitz, Alexion, Clynes, the AAUP, and the ANA have all moved, pursuant to Rules 24(a)(1), 24(a)(2), and 24(b)(2), Fed. R. Civ. P., for leave to intervene as plaintiffs in the *Lewis* action. The applicants for intervention in the *Lewis* action were all actuated to file their motions by a desire to challenge, in identical fashion to the EEOC's complaint in the *Lewis* action, the conduct of Superintendent Lewis in refusing to approve Unisex II. The EEOC, plaintiff in the *Lewis* action, has joined in the Moshowitz-Alexion-Clynes motion insofar as it relies on Rule 24(a)(1). In the paragraphs that follow, the Court deals in turn with each of the three bases for intervention relied upon by the movants.

1. Rule 24(a)(1). Rule 24(a)(1), Fed. R. Civ. P., provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Since the Court finds that each of the three motions to intervene in the *Lewis* action was filed in a timely fashion,[3] it must grant these motions to the extent that a statute of the United States confers an unconditional right to intervene upon the movants. Title VII does confer upon certain persons an unconditional right to intervene in an enforcement action brought by the EEOC. The relevant statutory language states that "[t]he person or persons

3 TIAA and CREF base their contention that these motions were not timely filed on their hypothesis that the *Lewis* action and the *Spirt* action would be consolidated, meaning that the motions to intervene in the *Lewis* action really ought to be treated as if they were motions to intervene in the *Spirt* action. Since the Court, by today's opinion, denies the EEOC's motions to consolidate the *Spirt* action and the *Lewis* action, the TIAA-CREF theory of untimeliness clearly fails. There can be no doubt, given that the motions to intervene in the *Lewis* action were filed promptly after the filing of the complaint in that action, and that there has been virtually no litigation on the merits in the *Lewis* action, that these motions were timely filed insofar as the *Lewis* action is concerned.

aggrieved [by an alleged violation of Title VII] shall have the right to intervene in a civil action brought by the [EEOC, on account of the alleged violation, pursuant to 42 U.S.C. § 2000e-5(f)(1)]." 42 U.S.C. § 2000e-5(f)(1).

The right of the movants to intervene in the *Lewis* action under Rule 24(a)(1) thus depends on whether they are "persons aggrieved" as that term is used in the above-quoted statutory language. All the parties agree that, in order to qualify as a "person aggrieved" within the meaning of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), one must at least have an interest in the litigation sufficient to establish standing under article III of the United States Constitution. *See EEOC* v. *American Telegraph & Telephone Co.*, 506 F.2d 735, 740 (3d Cir. 1974); *cf. Senter* v. *General Motors Corp.*, 532 F.2d 511, 516-17 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971) (both applying article III standing analysis to determine whether plaintiff was a "person aggrieved" entitled to commence a private Title VII action under 42 U.S.C. § 2000e-5(f)(1)). However, TIAA and CREF assert that, in addition to this requirement, intervention in an EEOC-filed civil action pursuant to 42 U.S.C. § 2000e-5(f)(1) is limited to the person or persons who actually filed the charge that prompted the EEOC to commence the action.

The Court has found no case that rules on whether the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1) is properly interpreted as imposing the additional requirement urged by TIAA and CREF. It observes, however, that the interpretation advanced by TIAA and CREF is strongly supported by the structure of 42 U.S.C. § 2000e-5(f)(1) as a whole. Elsewhere in that section, the EEOC is required, in the event it dismisses a charge, or in the event a charge does not lead to the EEOC's commencement of a civil action within 180 days after its filing, to notify "the person aggrieved" of this fact. Upon receipt of such a notice, commonly known as "right-to-sue" letter, "the person claiming to be aggrieved" may bring a civil action against the respondent named in the charge. It seems plain from the face of the statute that the person whom the

Commission is required to notify, and who thereby gains the right to sue, is the person who filed the charge—not every person who might have had constitutional standing to file a similar charge or to commence a similar civil action. If, as the wording of the statute indicates, the term "person aggrieved," when used in the context of an EEOC decision to dismiss or to decline to act on a charge, means the person who filed the charge, logic dictates that Congress must have intended to give "person aggrieved" the same meaning when it used this term in the context of an EEOC decision to commence a civil action on the basis of a charge. In other words, if Congress intended for the person who filed the charge ("the person aggrieved") to be the only person statutorily entitled to notice and consequently to file suit in the event the EEOC dismissed or declined to act on the charge, Congress must also have intended for the person who filed the charge ("the person aggrieved") to be the only person statutorily entitled to intervene in the event the EEOC determined to commence a civil action based on the charge.

The Court's view that the statutory language strongly indicates that Congress, in drafting the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), must have used the term "person aggrieved" to refer to a person who filed a charge with the EEOC is fully supported by the legislative history of that section. The wording of 42 U.S.C. § 2000e-5(f)(1) was agreed upon at a House-Senate conference on the bills that ultimately were enacted as the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). The conference report explained the section as follows:

> The conferees adopted a provision allowing the Commission, or the Attorney General in a case against a state or local government agency, to bring an action in Federal district courts if the Commission is unable to secure from the respondent "a conciliation agreement acceptable to the Commission." Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation

> agreement to which such aggrieved party is not a signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.

H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17-18 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 2137, 2182. From this explanation, the Court concludes that the conferees had two principles firmly in mind when they wrote 42 U.S.C. § 2000e-5(f)(1): (1) in order to commence a private Title VII civil action as a "person aggrieved," the prospective plaintiff must, *inter alia*, first have filed a charge with the EEOC; and (2) the term "person aggrieved" has an identical meaning in reference to both the persons entitled to commence a private civil action under Title VII and the persons entitled to intervene in an EEOC-filed civil action under Title VII. A third principle inevitably flows from these two: in order to intervene in an EEOC-filed Title VII civil action as a "person aggrieved," the prospective intervenor must, *inter alia*, have filed the charge with the EEOC that prompted the action.

On the basis of a consideration of just the language and legislative history of the statute, then, the Court would be inclined to hold that the right of intervention provided in 42 U.S.C. § 2000e-5(f)(1) may only be invoked by a person (1) who has an interest in the action sufficient to establish standing under article III of the United States Constitution, and (2) who filed the charge that prompted the EEOC to commence the action in which intervention is sought. However, the Court notes that, under existing case law, a private person having article III standing will be permitted to *commence* a private Title VII action as a "person aggrieved" within the meaning of 42 U.S.C. § 2000e-5(f)(1) if (1) the plaintiff previously filed a charge with the EEOC, *or* (2) some other private person previously filed an EEOC charge "so similar [to the claim stated in the plaintiff's complaint] that no conciliatory purpose would [have been] served" if the plaintiff had also filed a charge with the EEOC. *Foster* v. *Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981). That is, if the plaintiff has article III

standing, but has not previously filed an EEOC charge, he or she will still be a proper Title VII plaintiff as long as *someone else* has previously filed an EEOC charge "nearly identical" to the claim set forth in the plaintiff's complaint. *Id.* at 1323; *accord, Crawford* v. *United States Steel Corp.*, 660 F.2d 663, 666 (5th Cir. 1981).

In the Court's view, it would be nonsensical for the courts to give the term "person aggrieved," as used in 42 U.S.C. § 2000e-5(f)(1), one meaning for the purpose of determining a person's right to commence a private Title VII action and a second, different meaning in order to determine a person's right to intervene in an EEOC-filed Title VII action. Accordingly, the Court, while attentive to the language and legislative history of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1),[4] holds on the basis of the judicial precedent just discussed that the right of intervention provided in 42 U.S.C. § 2000e-5(f)(1) may only be invoked if (1) the proposed intervenor has an interest in the action sufficient to establish standing under article III of the United States Constitution, and (2) the action was commenced by the EEOC in response to a charge filed either (a) by the proposed intervenor or (b) by

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4 The parties have not referred the Court to any administrative interpretation of the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1). The EEOC, in its memorandum in support of the Moshowitz-Alexion-Clynes intervention motion, does not argue that the statute gives Moshowitz, Alexion, and Clynes an unconditional right to intervene; the EEOC states merely that the *policy* of the statute would be served by permitting these three persons to intervene. Unfortunately for the proposed intervenors, Rule 24(a)(1) is limited to situations where "a statute of the United States confers an unconditional right to intervene," and cannot be read to apply in cases where "a statute of the United States is based on a policy that supports allowance of the proposed intervention." Even if the EEOC had taken the express position, either in its regulations or in a brief filed with the Court, that 42 U.S.C. § 2000e-5(f)(1) should be interpreted to confer on some or all of the proposed intervenors an unconditional right to intervene in the *Lewis* action, the Court is extremely doubtful that it would be disposed to endorse such an interpretation in the face of the contradictory language and legislative history of the statute.

another private party having a nearly identical claim to the claim raised by the proposed intervenor.

None of the proposed intervenors in the *Lewis* action has satisfied the second prong of this test. The AAUP has never filed a charge with the EEOC relative to any of the named defendants in the *Lewis* action. While Moshowitz, Alexion, Clynes, and the ANA have filed such charges relative to TIAA and CREF, these charges in no way challenged any conduct performed by Superintendent Lewis and did not prompt the EEOC's commencement of the *Lewis* action.[5] There has been no suggestion that the *Lewis* action was commenced in response to a privately filed charge against Superintendent Lewis "nearly identical" to the claims raised against Superintendent

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5 The Court rejects the argument that Moshowitz, Alexion, Clynes, and the ANA, simply because they once filed charges with the EEOC against TIAA and CREF, therefore must be permitted to intervene in the *Lewis* action in spite of the fact that their charges in no way involved Superintendent Lewis and had nothing to do with the commencement of the *Lewis* action. It must be remembered that the *Lewis* action only challenges conduct performed by *Superintendent Lewis*, and that TIAA and CREF are named as defendants only on the theory that their joinder is required by Rule 19. The Court refuses to believe that Congress, when it enacted the intervention provision contained in 42 U.S.C. § 2000e-5(f)(1), intended for *anyone* who files a charge with the EEOC against a particular person thereby to gain an *unconditional* right to intervene in *any* EEOC action naming the charged person as a defendant, no matter where, when, or under what circumstances the action in which intervention is sought happened to be commenced. Under this interpretation of 42 U.S.C. § 2000e-5(f)(1), any of the charging parties in any of the numerous Title VII actions against TIAA and CREF currently pending around the country would have an *absolute right* to intervene in the *Lewis* action. The Court does not believe that Congress could have intended this result, particularly when it observes (1) that Moshowitz, Alexion, and Clynes did not choose to intervene in *EEOC* v. *Columbia University*, No. 78 Civ. 4420(TPG) (S.D.N.Y.), an action commenced by the EEOC against TIAA and CREF on the basis of a charge filed with the EEOC by Moshowitz, Alexion, and Clynes, and (2) that the ANA is the plaintiff in *ANA* v. *TIAA*, No. C-75-558-G (M.D.N.C.), an action commenced by the ANA against TIAA and CREF on the basis of a charge filed with the EEOC by the ANA.

Lewis here by the proposed intervenors.[6] Thus, none of the proposed intervenors in the *Lewis* action has an unconditional right to intervene in the *Lewis* action by virtue of 42 U.S.C. § 2000e-5(f)(1). The Court accordingly denies their motions to intervene in the *Lewis* action insofar as they rely on Rule 24(a)(1).

2. Rule 24(a)(2). Rule 24(a)(2), Fed. R. Civ. P., provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Thus, Rule 24(a)(2) sets forth a four-part test for intervention as of right. Under this test, an applicant for intervention must be permitted to intervene in an action if (1) the application was made in timely fashion, (2) the applicant claims an interest relating to the property or transaction that is the subject of the action, (3) the applicant is so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, and (4) the applicant's interest is not adequately represented by existing parties. *Foster* v. *Gueory, supra,* 655 F.2d at 1324-25; *United States Postal Service* v.

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6 Indeed, there has been no suggestion that the *Lewis* action was commenced in response to *any* privately filed charge. The Court assumes, for the purposes of today's opinion, that the EEOC commenced the *Lewis* action under the authority of 42 U.S.C. § 2000e-5(f)(1). If the *Lewis* action was not commenced under 42 U.S.C. § 2000e-5(f)(1), there is plainly no argument that any private party may intervene as of right in the *Lewis* action pursuant to Rule 24(a)(1). *EEOC* v. *United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). Of course, 42 U.S.C. § 2000e-5(f)(1) would only provide a jurisdictional basis for the *Lewis* action if (1) the *Lewis* action was commenced in response to a charge filed by a person aggrieved or by a member of the EEOC, and (2) Superintendent Lewis is an "employer" within the meaning of Title VII. *See* 42 U.S.C. § 2000e-5(b). The Court does not decide either of these questions by today's opinion.

Brennan, 579 F.2d 188, 191 (2d Cir. 1978); *Weisman* v. *Darneille*, 89 F.R.D. 47, 50 (S.D.N.Y. 1980).

There can be little doubt that the first three prongs of this test are satisfied with respect to each of the applicants to intervene in the *Lewis* action. First, their applications for intervention were, for the reasons set forth in note 3 *supra*, made in a timely fashion. Second, since the alleged conduct challenged by the EEOC's complaint in the *Lewis* action directly threatens significantly to affect the amount of retirement benefits that Moshowitz, Alexion, Clynes, and members of the AAUP and the ANA will be contractually entitled to receive on account of their future contributions to the TIAA and CREF plans, the movants claim a sufficient Rule 24(a)(2) interest relating to the transactions that are the subject of the *Lewis* action. *See New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam) (association has requisite interest for purposes of Rule 24(a)(2) if some of its members have the requisite Rule 24(a)(2) interest and association exists to protect that interest); *In re Penn Central Commercial Paper Litigation, supra*, 62 F.R.D. at 346 (interest that is significant, directly affected by challenged conduct, and legally protectable is sufficient to satisfy this portion of Rule 24(a)(2)). Third, since the Court's adjudication of the *Lewis* action could have a *stare decisis* effect that would negatively impact on the movants' hopes for success in other litigations involving TIAA and CREF, there can be no doubt that the movants are so situated that the Court's disposition of the *Lewis* action may impair or impede their ability to protect the interest described above. *Foster* v. *Gueory, supra*, 655 F.2d at 1325; *New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra*, 516 F.2d at 352 (both holding that possible *stare decisis* effect of court's decision creates sufficient threat of "impairment" of applicant's interest to satisfy this portion of Rule 24(a)(2)).

The difficult question with respect to Rule 24(a)(2) is whether the fourth prong of the test set forth above has been satisfied. The determination whether the applicant's interest is

adequately represented by existing parties is a decision within the sound discretion of the trial court. *Rios* v. *Enterprise Association Steamfitters Local 638,* 520 F.2d 352, 355 (2d Cir. 1975). Generally, this prong of the Rule 24(a)(2) test imposes only a "minimal" burden on the applicant for intervention, *see Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972), under which the movant is merely required to show that the representation afforded its interest by existing parties "may be" inadequate. *United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. However, where one of the parties to the action in which intervention is sought is charged by law with representing the interest of the applicant for intervention, the movant faces a more stringent burden; in such a case, a very strong showing of inadequate representation must be made. 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909, at 525-31 (1972).

TIAA and CREF urge that, since the EEOC is the plaintiff in the *Lewis* action, the applicants for intervention in the *Lewis* action are subject to the more stringent burden described above. However, the movants point out that the EEOC is charged by law with representing the *public* interest in the *Lewis* action, and not necessarily the interests of the movants. On this basis, the movants argue that they should be required only to make the above-described "minimal" showing of inadequacy of representation in order to satisfy their burden on this point. The Court agrees with the movants. "[U]nder the procedural structure created by the [Equal Employment Opportunity Act of 1972, *supra*], the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties. . . ." *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355, 368 (1977). Rather, "[w]hen the EEOC acts, . . . it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone Co.* v. *EEOC,* 446 U.S. 318, 326 (1980). "In achieving the broad social and economic objectives of [Title VII], the [EEOC] may be more concerned with future compliance with [Title VII] by employers than with redressing employee grievances that have accrued already." *McClain* v. *Wagner Electric Corp.,* 550 F.2d

1115, 1121-22 (8th Cir. 1977). Thus, when it files an enforcement action, "the EEOC is not merely a proxy for the victims of discrimination." *General Telephone Co.* v. *EEOC, supra,* 446 U.S. at 326. The EEOC cannot, therefore, be regarded as charged by law with representing the interests of the applicants for intervention in the *Lewis* action; accordingly, these applicants need only make the customarily required "minimal" showing of inadequate representation.

However, the movants have failed to make even this showing. The complaint in the *Lewis* action alleges that Superintendent Lewis has applied the New York Insurance Law in a manner that the EEOC contends conflicts with the United States Constitution, Title VII, and the Equal Pay Act. The EEOC seeks a declaratory judgment to this effect and an injunction against such unlawful conduct. The proposed intervenors challenge Superintendent Lewis' conduct in precisely the same fashion and seek an identical judgment against Superintendent Lewis. They have not suggested that the EEOC might fail to raise an argument that supports the judgment that they seek. The EEOC and the proposed intervenors agree that the *Lewis* action is ripe for summary judgment, meaning that there is no question of a possible conflict in trial strategy. Thus, the *Lewis* action is not a case where the Court need be concerned that the EEOC's goal is not necessarily coterminous with the goals of individual victims of discrimination. On the contrary, from all appearances the *Lewis* action is a case where the plaintiff has the identical ultimate objective as the applicants for intervention. *See United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. The proposed intervenors have not overcome the presumption of adequate representation that arises in such a case. *Virginia* v. *Westinghouse Electric Corp.,* 542 F.2d 214, 216 (4th Cir. 1976). Accordingly, they have not shown that they are entitled to intervene as of right under Rule 24(a)(2).

3. Rule 24(b)(2). Under Rule 24(b)(2), Fed. R. Civ. P., "[u]pon timely application anyone may be permitted to intervene in action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

Thus, intervention as a plaintiff under Rule 24(b)(2) is permissible only if (1) the application to intervene was made in timely fashion, and (2) the applicant's claim and the plaintiff's claim have a question of law or fact in common. In cases where Rule 24(b)(2) intervention is *permissible*, the decision whether intervention should be *permitted* is wholly discretionary with the trial court. *United States Postal Service* v. *Brennan, supra,* 579 F.2d at 191. The principal consideration guiding the trial court's discretion is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Weisman* v. *Darneille, supra,* 89 F.R.D. at 52; *United States* v. *Columbia Pictures Industries, Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980). Also important is the extent to which the proposed intervenor can be expected, by its participation in the action as a party, to shed light on the facts of the case that will be helpful to the Court in resolving the issues before it. *Barcia* v. *Sitkin,* 89 F.R.D. 382, 384 (S.D.N.Y. 1981).

There is no doubt that the Rule 24(b)(2) intervention sought by the movants is *permissible*. For the reasons set forth in note 3 *supra,* the Court finds that all the applicants for intervention acted in a "timely" fashion. Since all the applicants for intervention challenge the conduct of Superintendent Lewis in virtually identical fashion to the EEOC, their claims and the *Lewis* action have essentially *all* questions of law and fact in common.

However, the Court has not been persuaded that the Rule 24(b)(2) intervention sought by the movants should be *permitted*. As would be expected by virtue of the similarity between the movants' claims and the EEOC's claim, and as is evidenced by the near identity between the Moshowitz-Alexion-Clynes summary judgment motion and the summary judgment motion filed by the EEOC in the *Lewis* action, interjection of any or all of the proposed movants into the *Lewis* action would create an enormous duplication of effort on the plaintiffs' side of the *Lewis* action, while placing an unnecessary burden on Superintendent Lewis and the other defendants in responding to the additional motions, affidavits, and briefs that would inevitably be generated. While the proposed intervenors might possibly

shed additional light on certain issues before the Court in the *Lewis* action were they to be made parties thereto, it is unlikely, given the EEOC's expertise in the area, that the proposed intervenors would be of great assistance to the Court. Further, the Court is disposed to grant all of the proposed intervenors leave to participate in the *Lewis* action as *amici curiae*. *See Blowers* v. *Lawyers Co-operative Publishing Co., supra,* 527 F.2d at 334. On the basis of all these considerations, the Court declines to exercise its discretion to permit any of the applicants for intervention to intervene in the *Lewis* action pursuant to Rule 24(b)(2).

4. Conclusion. None of the applicants for intervention in the *Lewis* action has made the showing required by Rule 24(a)(1), Fed. R. Civ. P., Rule 24(a)(2), Fed. R. Civ. P., or Rule 24(b)(2), Fed. R. Civ. P. The Court therefore denies the motions of Moshowitz, Alexion, Clynes, the AAUP, and the ANA for leave to intervene in the *Lewis* action. However, the movants are granted leave to participate in the *Lewis* action as *amici curiae*. Since Moshowitz, Alexion, and Clynes have been denied leave to intervene in the *Lewis* action, the Moshowitz-Alexion-Clynes motion for summary judgment against Superintendent Lewis in the *Lewis* action is also denied.

D. The AAUP Motion to Intervene in the Spirt *Action*

The AAUP has moved, pursuant to Rules 24(a)(2) and 24(b)(2), Fed. R. Civ. P., for leave to intervene as a plaintiff in the *Spirt* action. It is important to note at the outset that the reason for the AAUP's desire to intervene in the *Spirt* action is entirely different from the rationale for the AAUP's motion for leave to intervene in the *Lewis* action. The AAUP sought leave to intervene in the *Lewis* action in order that it could challenge, in identical fashion to the EEOC's complaint in the *Lewis* action, the conduct of Superintendent Lewis in refusing to approve Unisex II. However, the AAUP seeks leave to intervene in the *Spirt* action in order that it can oppose the TIAA-CREF motion for partial relief from the *Spirt* judgment.

The Court has already set forth the four-part test that governs intervention as of right under Rule 24(a)(2). The first three parts of this test have undoubtedly been satisfied here by the AAUP with respect to the issue raised by the TIAA-CREF motion for relief from judgment. First, for the reasons set forth in the Court's discussion of the EEOC's motion for leave to intervene in the *Spirt* action, the AAUP's motion was made in "timely" fashion insofar as the AAUP seeks to oppose the TIAA-CREF motion for relief from judgment. Second, since the TIAA-CREF motion for relief from judgment directly threatens significantly to affect the amount of retirement benefits that members of the AAUP will be contractually entitled to receive on account of their past contributions to the TIAA and CREF plans, the AAUP claims a sufficient Rule 24(a)(2) interest relating to the issue raised by the TIAA-CREF motion for relief from judgment. *See New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra,* 516 F.2d at 352 (association has requisite Rule 24(a)(2) interest if some of its members have the requisite Rule 24(a)(2) interest and the association exists to protect that interest); *In re Penn Central Commercial Paper Litigation, supra,* 62 F.R.D. at 346 (interest that is significant, directly affected by challenged conduct, and legally protectable is sufficient to satisfy this portion of Rule 24(a)(2)). Third, since the Court's determination of the TIAA-CREF motion for relief from judgment could have a *stare decisis* effect that would negatively impact on the AAUP's hopes for success in other litigations on the issue raised by that motion, the AAUP is so situated that the Court's disposition of the TIAA-CREF motion for relief from judgment may impair or impede the AAUP's ability to protect the interest described above. *Foster* v. *Gueory, supra,* 655 F.2d at 1325; *New York Public Interest Research Group, Inc.* v. *Regents of the University of the State of New York, supra,* 516 F.2d at 352.

The Court also finds that the fourth prong of the Rule 24(a)(2) test has been satisfied with respect to the issue raised by the TIAA-CREF motion for relief from judgment. The EEOC has, of course, been granted leave to intervene in the

Spirt action in order to contest this very issue. In spite of this fact, the AAUP is only required, as the Court explained earlier in its discussion of the motions to intervene in the *Lewis* action, to show that its interest with respect to the issue raised by the TIAA-CREF motion for relief from judgment "may be" inadequately represented by the existing parties to the *Spirt* action. Since, as the Court points out in part III of today's opinion, the AAUP's position on the TIAA-CREF motion for relief from judgment is different from that advanced by any of the parties to the *Spirt* action, including the EEOC, the Court has little difficulty in concluding that the AAUP has shown the requisite possibility of inadequate representation by the existing parties on the issue raised by that motion. *See Adams* v. *Mathews,* 536 F.2d 417, 418 (D.C. Cir. 1976) (per curiam) (representation inadequate for purposes of Rule 24(a)(2) where none of the existing parties to the litigation support proposed intervenor's view of the applicable law). Accordingly, pursuant to Rule 24(a)(2), Fed. R. Civ. P., the AAUP is granted leave to intervene in the *Spirt* action with respect to the issue raised by the TIAA-CREF motion for relief from judgment.[7]

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7 The Court pauses to add that, if the AAUP were not entitled by Rule 24(a)(2) to intervene as of right with respect to the issue raised by the TIAA-CREF motion for partial relief from the *Spirt* judgment, the Court would grant the AAUP leave to intervene in this fashion pursuant to Rule 24(b)(2). Since the AAUP's application was timely filed, and since the AAUP's intervention would be for the purpose of contesting the precise question of law raised by the TIAA-CREF motion, intervention under Rule 24(b)(2) would, under the principles stated in connection with the Court's discussion of the motions to intervene in the *Lewis* action, unquestionably be *permissible*. Since, as the Court explained earlier in its discussion of the EEOC's motion for leave to intervene in the *Spirt* action, no undue delay or prejudice would flow from allowing the AAUP to intervene on this one issue, the Court would be acting in the proper exercise of its discretion were it to hold that such an intervention should be *permitted*.

The Court also adds that, while the AAUP has never filed an EEOC charge against any of the named defendants in the *Spirt* action, this fact imposes no barrier to the intervention granted by the Court. The AAUP's proposed intervention in the *Spirt* action presents a case where "the [proposed intervenor] has asserted claims of [sex] discrimination so similar to those asserted by the original plaintiff[ ] that no purpose would be served by

Notwithstanding its statement that it desires to intervene in the *Spirt* action only in order to oppose the TIAA-CREF motion for relief from judgment, the AAUP's motion for leave to intervene in the *Spirt* action seeks an order whereby the AAUP would become a plaintiff in the *Spirt* action for all purposes. The AAUP is not entitled by Rule 24(a)(2) to intervene in this broad fashion. First, since the AAUP moved to intervene approximately seven years after the *Spirt* action was commenced and approximately two years after a final judgment was entered in the *Spirt* action, and since allowance of the broad intervention sought by the AAUP would delay adjudication of and prejudice the existing parties to the *Spirt* action in the fashion described by the Court in its discussion of the EEOC's motion to intervene in the *Spirt* action, the Court finds that the AAUP's application to intervene was not timely filed insofar as it seeks an order granting the AAUP leave to intervene in the *Spirt* action for all purposes. *See Crown Financial Corp.* v. *Winthrop Lawrence Corp., supra*, 531 F.2d at 77 ("[i]ntervention after judgment is unusual and not often granted"); *Carey* v. *Klutznick, supra*, 88 F.R.D. at 250 (factors relevant to timeliness under Rule 24 include extent to which the suit has progressed and the length of time applicant for intervention knew of its interest in the suit before moving for leave to intervene); *United States* v. *International Business Machines Corp., supra*, 62 F.R.D. at 541-42 (most important factor to timeliness question under Rule 24 is whether delay in moving for intervention has prejudiced any of the existing parties). Second, with the exception of the interest implicated

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requiring [the proposed intervenor] to file independent [sex] discrimination charges with the EEOC." In such a case, the application to intervene should be judged by the criteria set forth in Rule 24, without imposing an additional exhaustion-of-administrative-remedies requirement. *Foster* v. *Gueory, supra*, 655 F.2d at 1323; *cf. Hodge* v. *McLean Trucking Co.*, 607 F.2d 1118, 1121 (5th Cir. 1979) (per curiam) (denying leave to intervene because proposed intervenors had not filed EEOC charges; however, *see Crawford* v. *United States Steel Corp., supra*, 660 F.2d at 665 n.7, original plaintiff had not filed EEOC charge either).

by the TIAA-CREF motion for relief from judgment, the AAUP has made no showing that it has an interest in any issue presently justiciable in the *Spirt* action that may be inadequately represented by the existing parties to the *Spirt* action.

Nor does Rule 24(b)(2) provide a basis for the Court to grant the AAUP leave to intervene in the *Spirt* action for all purposes. The Court has already set forth the standard for Rule 24(b)(2) intervention in its discussion of the motions to intervene in the *Lewis* action. Since, for the reasons just stated, the AAUP's application to intervene was not timely filed insofar as it seeks leave to intervene for all purposes, the Rule 24(b)(2) intervention sought by the AAUP is not *permissible*. Even if such intervention were permissible, the delay and prejudice that would, as the Court explained in its discussion of the EEOC's motion to intervene in the *Spirt* action, likely flow from an order allowing such intervention would prevent the Court from exercising its discretion to *permit* the AAUP to intervene for all purposes.

Accordingly, the AAUP's motion, pursuant to Rules 24(a)(2) and 24(b)(2), Fed. R. Civ. P., for leave to intervene in the *Spirt* action is granted in part and denied in part. The AAUP is granted leave to intervene as a plaintiff in the *Spirt* action only for the purpose of contesting the TIAA-CREF motion for partial relief from the *Spirt* judgment. With respect to the other issues pending before the Court in the *Spirt* action, the AAUP shall have leave to participate in the *Spirt* action as an *amicus curiae*. *See Blowers* v. *Lawyers Co-operative Publishing Co.*, *supra*, 527 F.2d at 334.

II. Motions Relating to Spirt's Supplemental Complaint

Having emerged from its journey through the entire labyrinth of Rule 24 of the Federal Rules of Civil Procedure, the Court turns to the second of the three major topics that it deals with in today's opinion, namely, the motions filed in the *Spirt* action relating to Spirt's supplemental complaint. Spirt has filed a motion, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment against Superintendent Lewis. TIAA and CREF, joined by Superintendent Lewis, have opposed this

motion and have cross-moved, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing Spirt's supplemental complaint.

The Court must first deal with a somewhat unusual jurisdictional problem posed by Spirt's motion. By her motion, Spirt seeks (1) a declaratory judgment that Superintendent Lewis, in refusing to approve Unisex II, violated certain provisions of the federal constitution and of federal statutes; and (2) an order, on the basis of Superintendent Lewis' refusal to approve Unisex II, amending the *Spirt* judgment insofar as the Court thereby found that Spirt had failed to state a claim against TIAA and CREF under 42 U.S.C. § 1983 ("Section 1983"). The second aspect of the relief sought by Spirt is, in the Court's view, clearly not attainable via a Rule 56 motion against Superintendent Lewis. It might be argued that such an amendment of the *Spirt* judgment can be attained, on the theory that "it is no longer equitable that [this aspect of] the [*Spirt*] judgment should have prospective application," via a motion pursuant to Rule 60(b)(5), Fed. R. Civ. P. However, the quoted portion of Rule 60(b)(5) only supports a motion for relief from judgment if the movant contends that a *prospective* judgment of a court has been rendered inequitable by events *subsequent* to the court's entry of that judgment. 7 *Moore's Federal Practice* ¶ 60.26[4], at 334-39 (2d ed. 1979). Here, while Spirt's effort to persuade the Court to reconsider its prior ruling on Spirt's Section 1983 claims is based on an event subsequent to the *Spirt* judgment (namely, Superintendent Lewis' refusal to approve Unisex II), the Court did not make any prospective rulings with respect to Spirt's Section 1983 claims in the *Spirt* judgment. In the normal course, then, the proper means for Spirt to present her new Section 1983 theory would have been to commence an entirely new action against TIAA and CREF. However, the literal terms of the order of remand issued in the *Spirt* action by the Court of Appeals direct this Court to consider Spirt's new Section 1983 claim.[8]

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8 In its order of remand, the Court of Appeals directed, in relevant part, "[t]hat the [*Spirt*] action be remanded to the District Court for the

The Court accordingly deems Spirt's motion to rely on both Rule 56, Fed. R. Civ. P., and Rule 60(b)(5), Fed. R. Civ. P., and finds that the mandate issued in the *Spirt* action by the Court of Appeals provides any necessary jurisdictional basis for this Court to hear the Rule 60(b)(5) aspect of Spirt's motion.

The Court deals first with the Rule 56 aspect of Spirt's motion. Spirt, in her supplemental complaint, contends that Superintendent Lewis' refusal to approve Unisex II constituted a violation of (1) the equal protection clause of the fourteenth amendment to the United States Constitution, (2) Title VII, and (3) the Equal Pay Act. By the Rule 56 aspect of her motion, Spirt seeks a declaratory judgment to this effect and an injunction against future refusals of a similar kind. This aspect of the relief sought by Spirt's motion is virtually identical to the relief sought by the EEOC in the *Lewis* action. For the reasons that follow, the Court holds that the issue whether Superintendent Lewis violated Title VII by his disapproval of Unisex II is not justiciable in the context of the *Spirt* action.

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purpose of permitting an application for joinder of the Superintendent of Insurance of the State of New York to the action so as to permit consideration by the District Court of the issues relating to the Superintendent's action [in refusing to approve Unisex II]." As is explained in greater detail in text *infra*, Spirt's new claim that TIAA and CREF are liable under Section 1983 is "related" to Superintendent Lewis' refusal to approve Unisex II. Read literally, then, the mandate of the Court of Appeals clearly directs the Court to consider Spirt's new Section 1983 claim. (The Court also observes that the Court of Appeals based its order of remand on its view that Superintendent Lewis' refusal to approve Unisex II was "relevant to the issues involved [in the *Spirt* action] on appeal." Spirt's Section 1983 claim was, in the Court's view, the only issue before the Court of Appeals in the *Spirt* action that was even arguably implicated by Superintendent Lewis' disapproval of Unisex II.) The Court thus rejects the TIAA-CREF argument that the issue raised by Spirt's new Section 1983 claim is not an issue that the Court of Appeals remanded for this Court's consideration. TIAA and CREF have had ample opportunity, in the event they took this argument seriously, to petition the Court of Appeals for clarification of its mandate.

Both Unisex II and Unisex III deal with the problem of calculating the benefits to be received by plan participants from their future contributions to the TIAA and CREF plans. All parties and *amici* in both the *Spirt* action and the *Lewis* action agree that the Unisex II method of calculating such benefits fully complies with Title VII. Superintendent Lewis refused to approve Unisex II on the ground that it did not comply with the New York Insurance Law. Plainly, if Unisex III, which Superintendent Lewis did approve, complies with Title VII, then Superintendent Lewis has done nothing more than disapprove one Title VII-sufficient plan (Unisex II) and later approve a second Title VII-sufficient plan (Unisex III). In this event, there is no claim against Superintendent Lewis for the simple reason that, unless no other method is available, Title VII does not afford any victim of unlawful discrimination a right to a particular method of ending that discrimination. Thus, the claims against Superintendent Lewis in the *Lewis* action and the *Spirt* action hinge on the theory that Unisex III, unlike Unisex II, does not pass muster under Title VII, meaning that Superintendent Lewis, by his disapproval of Unisex II, has impeded compliance with Title VII by TIAA and CREF.

Therefore, the viability of any claim based on Superintendent Lewis' disapproval of Unisex II depends on whether Unisex III complies with Title VII. The question of the sufficiency of Unisex III under Title VII is the issue now being litigated in the *Lewis* action. *It is not, however, being litigated in the* Spirt *action.* Counsel for Spirt has stated that he sees no objection under Title VII to the use of Unisex III by TIAA and CREF to calculate the benefits to be received by plan participants from their future contributions to the TIAA and CREF plans. There is no article III case or controversy over an issue when the parties desire precisely the same result with respect to the issue. *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 383 (1980); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971) (per curiam); L. Tribe, *American Constitutional Law* § 3-15, at 69 (1978). Since Spirt agrees with the TIAA-CREF-Superintendent Lewis position on the sufficiency of Unisex III under Title VII, the Court is

without power to adjudicate the Title VII-sufficiency of Unisex III in the context of the *Spirt* action. Since the lawfulness of Superintendent Lewis' refusal to approve Unisex II hinges on whether Unisex III passes muster under Title VII, the fact that the Title VII-sufficiency of Unisex III is not justiciable in the *Spirt* action means that the Court cannot, in the *Spirt* action, adjudicate the lawfulness of Superintendent Lewis' disapproval of Unisex II. Spirt's complaint must therefore be dismissed, insofar as it seeks declaratory or injunctive relief against Superintendent Lewis, on grounds of nonjusticiability.[9] This dismissal is, of course, without prejudice, on grounds of *res judicata*, collateral estoppel, "law of the case," or *stare decisis*, or under any other theory that counsel might one day proffer, to the similar claim presented against Superintendent Lewis by the EEOC in the *Lewis* action.

As noted, the Court has determined to interpret Spirt's Rule 56 motion to seek not only summary judgment against Superintendent Lewis but also a Rule 60(b)(5) amendment of the *Spirt* judgment. The Court now turns to the Rule 60(b)(5) aspect of Spirt's motion. In her supplemental complaint, Spirt alleges that Superintendent Lewis refused to approve Unisex II on account of its "unisex" feature, which feature Superintendent Lewis viewed to be in violation of the New York Insurance Law. Spirt has further alleged, in additional submissions to the Court, that Superintendent Lewis' understanding of the New

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9 The Court pauses to observe that, in holding that the issue of the lawfulness of Superintendent Lewis' disapproval of Unisex II is nonjusticiable, the Court has adopted the course apparently preferred by Spirt herself. In his final memorandum to the Court on the legal issues raised by Spirt's supplemental complaint, Spirt's counsel expressed the desire not to litigate any of the issues surrounding the Title VII-sufficiency of Unisex III or the lawfulness of Superintendent Lewis' disapproval of Unisex II, but rather to confine his effort to persuading the Court that Superintendent Lewis' disapproval of Unisex II was sufficient to convert the conduct of TIAA and CREF into state action for the purposes of Section 1983. *See* Plaintiff's Response Under the August 6, 1981 "Final" Filing Date, August 3, 1981, at 5-11. Thus, at least at the present time, Spirt apparently regards her supplemental complaint as directed against TIAA and CREF, not Superintendent Lewis.

York Insurance Law is such that he will disapprove any plan that adopts a "unisex" approach to calculating the benefits to be received by participants in the TIAA and CREF plans on account of their *past* contributions to those plans. In Spirt's view, the alleged conduct of Superintendent Lewis, by "compelling" the TIAA-CREF conduct of which Spirt complains, *see* Supplemental Complaint ¶ 11, converted the erstwhile "private action" of TIAA and CREF into "state action." On this basis Spirt argues that the *Spirt* judgment must be amended insofar as the Court thereby ruled that Spirt had failed to state a Section 1983 claim against TIAA and CREF because she had failed to allege "state action."

The Court believes that analysis of the Rule 60(b)(5) aspect of Spirt's motion is best begun by reviewing the Court's conclusion in *Spirt II* that Spirt had failed to state a Section 1983 claim against TIAA and CREF. Basically, the Court held that TIAA and CREF, being private entities, had not acted in a fashion such that their conduct could be deemed "state action," and thus that Spirt had failed to allege one of the necessary components of an equal protection claim under Section 1983. The Court recognized that action of a regulated entity such as TIAA or CREF may fairly be treated as action of the regulating state in a case where " 'there is a sufficiently close nexus between the [s]tate and the challenged action of the regulated entity.' " *Spirt II, supra*, 475 F. Supp. at 1311 (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). However, the Court failed to find the requisite nexus between the State of New York and the challenged action of TIAA and CREF, because it found nothing in the record to support a conclusion that the State of New York had compelled, or even fostered or encouraged, the alleged discrimination. *Spirt II, supra*, 475 F. Supp. at 1312-13 (citing *Moose Lodge 107* v. *Irvis*, 407 U.S. 163, 175-77 & n.3 (1972)).[10]

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10 The Court recognized, in *Spirt II*, that the state action question is probably governed by the former test, meaning that Spirt is probably required to show not merely that the State of New York "fostered or encouraged" the allegedly unlawful conduct, but instead that the State of

Analysis of the Rule 60(b)(5) aspect of Spirt's motion also requires a clear understanding of the TIAA-CREF conduct that Spirt alleges was in violation of the Constitution. When she originally filed her complaint in the *Spirt* action, Spirt challenged, on both federal constitutional and federal statutory grounds, that aspect of the then-operative TIAA and CREF retirement plans pursuant to which TIAA and CREF used sex-segregated mortality tables in calculating any benefits to be received by a participant in the plans. The Court held in *Spirt II*, and reiterates today, that CREF's use of such tables was unlawful under Title VII and that CREF must use sex-merged mortality tables in calculating the benefits to be received by plan participants who retire on or after May 1, 1980 ("deferred annuitants"), with respect to both their *future* contributions (*i.e.*, contributions made by deferred annuitants on or after May 1, 1980) and their *past* contributions (*i.e.*, contributions made by deferred annuitants before May 1, 1980). After entry of the *Spirt* judgment, TIAA and CREF determined, "for reasons of business exigency," to use sex-merged mortality tables with respect to *future* contributions by deferred annuitants, and to this end successively proposed to adopt Unisex I, Unisex II, and Unisex III, all of which were designed to accomplish this goal. However, TIAA and CREF decided not to adopt sex-merged mortality tables with respect to *past* contributions by deferred annuitants. Spirt does not challenge, on either a constitutional or a statutory basis, the conduct of TIAA and CREF in proposing to adopt the sex-merged mortal-

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New York "compelled" that conduct. 475 F. Supp. at 1312 (citing *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 165 (1978)). Since the Court found that Spirt had not satisfied the less onerous fostered-or-encouraged standard, it was not required to determine which test actually governed the question. *Spirt II*, *supra*, 475 F. Supp. at 1312-13 nn.21-22. The Court reads the most recent decision on this issue by the Court of Appeals for this Circuit to support the view expressed by the Court in *Spirt II*. *See Jensen* v. *Farrell Lines, Inc.*, 625 F.2d 379, 387 (2d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). However, since Spirt has still failed to satisfy the fostered-or-encouraged standard, *see* text *infra*, the Court still need not decide whether this is actually the governing standard.

ity tables contained in Unisex I, Unisex II, or Unisex III. Thus, her constitutional claim against TIAA and CREF challenges two categories of TIAA-CREF conduct: (1) the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by a participant in the TIAA and CREF plans, and (2) the subsequent TIAA-CREF decision not to adopt sex-merged mortality tables in calculating the benefits to be received by deferred annuitants on the basis of their *past* contributions to the TIAA and CREF plans. Since the two categories of conduct just listed fully describe the TIAA-CREF conduct that Spirt alleges to have been unconstitutional, Spirt has only stated a Section 1983 claim against TIAA and CREF if some or all of the conduct described in these two categories was "state action." Under the principles set forth in *Spirt II*, there can be no finding that some or all of this conduct was "state action" unless Spirt has alleged facts from which the Court could find that the State of New York "compelled," or at a minimum "fostered or encouraged," some or all of this conduct. 475 F. Supp. at 1311-13.

In *Spirt II*, the Court rejected the proposition that Spirt had alleged facts from which the Court could find that the State of New York "compelled," or even "encouraged," the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by any participant in the TIAA and CREF plans. *See* 475 F. Supp. at 1312-13. Given that the events alleged in Spirt's supplemental complaint occurred *after* TIAA and CREF determined not to continue this conduct (but decided instead to use sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on the basis of their future contributions), the events alleged in the supplemental complaint plainly afford the Court no new basis to find that the State of New York "compelled" or even "encouraged" this conduct. As a result, the allegations of Spirt's amended complaint are of assistance to her on the state action issue only if they provide a basis for the Court to find that the State of New York "compelled," or at a minimum "encouraged," the conduct in the second category listed above.

The Court sees no basis for holding, on the basis of the events alleged in the supplemental complaint and in Spirt's other submissions to the Court, that the State of New York "compelled" or even "encouraged" the TIAA-CREF decision not to adopt sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on the basis of their past contributions to the TIAA and CREF plans. Spirt argues that Superintendent Lewis' disapproval of Unisex II somehow "compelled" or "encouraged" TIAA and CREF to continue to use sex-segregated mortality tables with respect to past contributions from deferred annuitants. The Court observes, however, that Unisex II had nothing whatever to do with past contributions from deferred annuitants, but was concerned only with deferred annuitants' *future* contributions. Further, the record demonstrates that Superintendent Lewis has repeatedly asserted that the New York Insurance Law does not bar "unisex" treatment of future contributions made to the TIAA and CREF plans by deferred annuitants, and that, in accord with this view, Superintendent Lewis has approved Unisex III, a plan that Spirt finds perfectly acceptable for the purpose of calculating the benefits to be received on the basis of future contributions made by deferred annuitants. Given these circumstances, the Court could not possibly interpret Superintendent Lewis' disapproval of Unisex II as having "compelled" or even "encouraged" the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions.

Spirt alleges that Superintendent Lewis views the New York Insurance Law to forbid the use of sex-merged mortality tables with respect to past contributions from deferred annuitants, but to permit the use of such tables with respect to future contributions from deferred annuitants. This allegation, if proven, would not provide a basis for the Court to hold that the State of New York "compelled" or even "encouraged" the TIAA-CREF decision not to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants. Plainly, the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions from

deferred annuitants could only be found to have been "compelled," or even "encouraged," by Superintendent Lewis if there were some basis for finding that TIAA and CREF based their decision not to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants on Superintendent Lewis' alleged interpretation of the New York Insurance Law. While there is some evidence in the record that TIAA and CREF *originally* adopted sex-segregated mortality tables on account of the New York Insurance Law, *see Spirt III, supra,* 475 F. Supp. at 1318; *Spirt II, supra,* 475 F. Supp. at 1312-13, Spirt has not alleged any facts from which the Court could find that TIAA and CREF, in proposing that future contributions from deferred annuitants be governed by sex-merged mortality tables while refusing to adopt sex-merged mortality tables with respect to past contributions from deferred annuitants, relied in doing so on Superintendent Lewis' alleged view that the New York Insurance Law permits a change to sex-merged mortality tables with respect to future contributions from deferred annuitants but forbids such a change with respect to past contributions from deferred annuitants.[11] Having failed to make such allegations, Spirt has

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11 Indeed, in the Court's view the record is clear that TIAA and CREF did not rely on Superintendent Lewis' interpretation of the New York Insurance Law in determining to distinguish between future contributions and past contributions from deferred annuitants. First, TIAA and CREF adopted this approach well before they became aware of Superintendent Lewis' apparent interpretation of the New York Insurance Law. Second, the Court is convinced, having supervised the *Spirt* action for approximately eight years and having had constant dealings with counsel for TIAA and CREF over the last three years, that TIAA and CREF have refused to use sex-merged mortality tables with respect to past contributions by deferred annuitants because of their deep, unshakeable beliefs that such a change would be unfair to male deferred annuitants and that Title VII does not require CREF to make such a change. TIAA and CREF made this argument to the Court in their original motions for summary judgment; CREF reiterated this argument in its motion for reargument after the Court granted Spirt's motion for summary judgment; TIAA and CREF make the argument again in their motion for partial relief from the *Spirt* judgment. Indeed, from all appearances, TIAA and CREF were utterly indifferent to the news that

alleged merely that Superintendent Lewis agrees with the TIAA-CREF decision to continue to use sex-segregated mortality tables with respect to past contributions from deferred annuitants, and has not alleged any sort of causal nexus between the view of Superintendent Lewis and the conduct of TIAA and CREF. The mere fact that a state regulatory agency approves of a regulated entity's action does not transmute the regulated entity's action into "state action." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Thus, the facts alleged by Spirt in her supplemental complaint and in her additional submissions to the Court would, if proven, be insufficient for the Court to find that the State of New York "compelled" or even "encouraged" either (1) the original TIAA-CREF decision to use sex-segregated mortality tables in calculating any benefits to be received by a participant in the TIAA and CREF plans or (2) the subsequent TIAA-CREF decision not to adopt sex-merged mortality tables in calculating the benefits that persons retiring on or after May 1, 1980, will receive on the basis of their contributions to the TIAA and CREF plans made before May 1, 1980. As a result, Spirt has failed to allege the "state action" that is a necessary component of a Section 1983 claim against TIAA and CREF.[12]

Superintendent Lewis had apparently concluded that the TIAA-CREF approach to deferred annuitants' past contributions is required by the New York Insurance Law. With all due respect to Superintendent Lewis, it appears that TIAA and CREF, like the Court, have been well aware throughout the litigation of the *Spirt* action that the question whether CREF is required to use sex-merged mortality tables with respect to past contributions by deferred annuitants is a question that will be decided purely on the basis of Title VII and that ultimately has nothing whatever to do with the New York Insurance Law or with Superintendent Lewis' interpretation of that law.

12 The Court is, of course, well aware of the line of cases where the requisite state action has been found merely by virtue of the plaintiff's allegation that the private defendant acted jointly with a state official named as a co-defendant. *See, e.g., Dennis* v. *Sparks,* 449 U.S. 24, 27-28 & n.4 (1980); *Lugar* v. *Edmondson Oil Co.,* 639 F.2d 1058, 1062-65 (4th Cir.) (en banc), *cert. granted,* 101 S.Ct. 3078 (1981). This line of cases was not

In the event the Court's September 18, 1979, judgment is affirmed on appeal, and Superintendent Lewis thereafter refuses to approve a CREF proposal to use sex-merged mortality tables to calculate the benefits that persons retiring on or after May 1, 1980, will receive on the basis of their contributions to the TIAA and CREF plans made before May 1, 1980, it would, of course, be open to Spirt to raise the state action issue once again by commencing a new Section 1983 action on the basis of these intervening events.

Accordingly, Spirt's motion is denied in its entirety. Insofar as this motion seeks summary judgment against Superintendent Lewis pursuant to Rule 56, Fed. R. Civ. P., it is denied because the issue whether Superintendent Lewis violated the federal constitution or any federal statute by his refusal to approve Unisex II is not justiciable in the context of the *Spirt* action. Insofar as this motion has been deemed to seek an amendment of the *Spirt* judgment pursuant to Rule 60(b)(5), Fed. R. Civ. P., it is denied because Spirt has not alleged facts from which the Court could find that the State of New York compelled or even encouraged any of the conduct by TIAA and CREF that Spirt contends was unconstitutional. The TIAA-CREF cross-motion to dismiss the supplemental complaint against Superintendent Lewis is granted. The denial of Spirt's motion insofar as it relies on Rule 56 and the grant of the TIAA-CREF cross-motion to dismiss are without preju-

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implicated at the time of the Court's decision in *Spirt II* because no state official was then named as a defendant in the *Spirt* action. Nor is it implicated now by the mere fact that Spirt has filed a supplemental complaint that names Superintendent Lewis as a supplemental defendant. Nowhere in her supplemental complaint does Spirt allege or complain of any joint conduct between Superintendent Lewis on the one hand and TIAA and CREF on the other. On the contrary, Spirt's claim against Superintendent Lewis is, as explained in text *supra*, based on conduct wholly distinct from her claim against TIAA and CREF. Thus, rather than arguing that TIAA and CREF have acted *in concert* with Superintendent Lewis, Spirt has based her state action argument entirely on the (untenable) theory that TIAA and CREF performed their challenged conduct in obedience to Superintendent Lewis' orders. *See* Supplemental Complaint ¶ 11.

dice, on grounds of *res judicata,* collateral estoppel, "law of the case," or *stare decisis,* or under any other theory that counsel might one day proffer, to the claims presented against Superintendent Lewis by the EEOC in the *Lewis* action.

III. The TIAA-CREF Motion for Relief from Judgment

The Court now turns to the third and final topic of today's opinion, namely, the TIAA-CREF motion, pursuant to Rule 60(b), Fed. R. Civ. P., for partial relief from the *Spirt* judgment. The Court begins its discussion of this motion, as it began its discussion of the motions relating to Spirt's supplemental complaint, by clearing the jurisdictional air. As the Court reads the TIAA-CREF motion papers, the only portion of Rule 60(b) on which this motion could even arguably be based is Rule 60(b)(5), Fed. R. Civ. P., on the theory that "it is no longer equitable that [a particular part of] the [*Spirt*] judgment should have prospective application." However, as noted in part II of today's opinion, this portion of Rule 60(b) only supports a motion for relief from judgment if the movant contends that a *prospective* judgment of a court has been rendered inequitable by events *subsequent* to the court's entry of that judgment. 7 *Moore's Federal Practice, supra,* ¶ 60.26[4], at 334-39. Here, the TIAA-CREF effort to persuade the Court to modify the *Spirt* judgment is not based on any event subsequent to entry of the *Spirt* judgment. Further, TIAA and CREF purport, by their motion, to attack only a *retrospective* aspect of the *Spirt* judgment. In the normal course, then the Court would have no jurisdiction to hear the TIAA-CREF motion. However, the order of remand issued in the *Spirt* action by the Court of Appeals directs this Court to consider the issue raised by the TIAA-CREF motion. The Court accordingly deems the TIAA-CREF motion to rely on Rule 60(b)(5), Fed. R. Civ. P., and finds that the mandate issued in the *Spirt* action by the Court of Appeals provides any necessary jurisdictional basis for this Court to hear the TIAA-CREF motion.

By their motion for relief from judgment, TIAA and CREF seek amendment of that part of the *Spirt* judgment that

requires CREF to use sex-merged mortality tables to calculate the benefits to be received by deferred annuitants on account of their contributions to the CREF plan made *prior to* May 1, 1980. TIAA and CREF argue that the "good-faith reliance defense," a defense not considered by the Court in *Spirt II* or *Spirt III*, is available in the *Spirt* action; they urge that, as a result of the availability of this defense, CREF should be permitted to use *sex-segregated* mortality tables with respect to contributions made by deferred annuitants prior to May 1, 1980. Spirt agrees that the good-faith reliance defense is available in the *Spirt* action, but believes that this fact necessitates amendment of the *Spirt* judgment only to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the decision of the United States Supreme Court in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978). LIU, the EEOC, and the AAUP all view the good-faith reliance defense to be wholly unavailable in the *Spirt* action, and consequently argue that this defense presents no basis for amendment of the *Spirt* judgment. These three parties take differing views, however, on the extent to which the *Spirt* judgment would have to be amended in the event the good-faith reliance defense *were* available in the *Spirt* action. LIU believes that the availability of this defense would necessitate amendment of the *Spirt* judgment to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to this Court's decision in *Spirt II*; the AAUP states that the amendment of the *Spirt* judgment would only have to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the Supreme Court's decision in *City of Los Angeles* v. *Manhart, supra*; the EEOC argues that this amendment would only have to permit CREF to use sex-segregated mortality tables with respect to contributions made by deferred annuitants prior to the issuance, in 1972, of the EEOC's guidelines on the applicability of Title VII to educational institutions. In short, the parties to the *Spirt* action have presented the Court with five

different approaches to the issue raised by the TIAA-CREF motion for relief from judgment.

The TIAA-CREF motion for relief from judgment is based on two separate statutory provisions, one of which is contained in Title VII and the second of which is part of section 10 of the Portal-to-Portal Act.[13] The relevant portion of Title VII reads as follows:

> In any action or proceeding [under Title VII] based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on

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13 The TIAA-CREF theory that § 10 of the Portal-to-Portal Act can provide the basis for a defense to a Title VII action is as follows. Section 10 of the Portal-to-Portal Act provides, by its terms, a defense to an action under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19. The Equal Pay Act, 29 U.S.C. § 206(d), is part of the Fair Labor Standards Act of 1938; thus, § 10 of the Portal-to-Portal Act provides a defense under the Equal Pay Act. Now, the so-called "Bennett Amendment" to Title VII, 42 U.S.C. § 2000e-2(h), provides that "[i]t shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]." TIAA and CREF theorize that the defense provided by § 10 of the Portal-to-Portal Act is among the Equal Pay Act defenses incorporated into Title VII by the Bennett Amendment. In the Court's view, this interpretation is not at all supported by the statutory language (the defense afforded by § 10 of the Portal-to-Portal Act is not, as required by the Bennett Amendment, a defense "authorized by the provisions of" the Equal Pay Act, but rather is a defense "authorized by the provisions of" the Portal-to-Portal Act), and is seriously undercut by the Supreme Court's decision in *County of Washington* v. *Gunther*, 452 U.S. 161, ____, 101 S.Ct. 2242, 2249 (1981) (holding "that only differentials attributable to the four affirmative defenses of the Equal Pay Act are 'authorized' by that Act within the meaning of the Bennett Amendment"). *But see City of Los Angeles* v. *Manhart*, *supra*, 435 U.S. at 719-20 n.36 (citing § 10 of the Portal-to-Portal Act for the dictum that rulings of the Wage and Hour Administrator "provide a defense in [Title VII] sex discrimination cases"). Given the Court's holding that the defense provided by § 10 of the Portal-to-Portal Act is not available in the *Spirt* action even if it might be in some other Title VII action, the Court need not adjudicate the validity of the TIAA-CREF incorporation theory.

> account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. . . .

42 U.S.C. § 2000e-12(b). The relevant portion of section 10 of the Portal-to-Portal Act reads as follows:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. § 259(a).

The language of these two sections is virtually identical. Each section provides, in essence, that no person "shall be subject to any liability or punishment for or on account of" any violation by such person of the statutory provisions to which the section applies, if such person "pleads and proves that the [discriminatory] act or omission complained of was

[committed] in good faith . . . reliance on" a written interpretation issued by the agency authorized to interpret the statutory provisions to which the section applies. For either of these sections to apply in the *Spirt* action, then, and thereby to provide the basis for the TIAA-CREF motion for partial relief from the *Spirt* judgment, two conditions must pertain: (1) the *Spirt* judgment must subject CREF to a liability or punishment on account of discriminatory acts committed by CREF *prior to* the entry of the *Spirt* judgment,[14] and (2) CREF must prove that it committed these discriminatory acts *in good faith reliance on* a written interpretation issued by the agency authorized to interpret the statutory provisions to which the section applies.

The first prong of this test has not been satisfied here, because the relief ordered by the *Spirt* judgment is not concerned with any unlawful acts committed by CREF prior to the entry of the *Spirt* judgment. As the Court clearly held in *Spirt II*, the CREF plan violates Title VII because it uses sex-segregated mortality tables to calculate the benefits to be received by plan participants on account of their contributions to the CREF plan. 475 F. Supp. at 1315. Under the CREF plan,

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14 In other words, the two sections relied upon by TIAA and CREF are triggered only by an action that seeks retroactive relief, that is, an action where the liability or punishment sought to be imposed on a person is in the nature of compensation for an allegedly unlawful act done in the past. Thus, the courts have consistently held that these two sections provide a defense only to an award of damages or back pay. *See Rosenfeld* v. *Southern Pacific Co.*, 519 F.2d 527, 529 (9th Cir. 1975) (under 42 U.S.C. § 2000e-12(b)); *Yott* v. *North American Rockwell Corp.*, 428 F. Supp. 763, 768 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (under 42 U.S.C. § 2000e-12(b)); *Northwestern-Hanna Fuel Co.* v. *McComb*, 166 F.2d 932, 939 (8th Cir. 1948) (under 29 U.S.C. § 259(a)). The Court rejects any argument that these two sections might be triggered by an action that seeks prospective relief, that is, an action where the liability or punishment sought to be imposed on a person is in the nature of prohibiting the commission of an allegedly unlawful act proposed to be done in the future. Were these two sections capable of being read this broadly, the good faith reliance defense would arguably preclude an award of any injunctive relief in the *Spirt* action at all.

however, CREF's unlawful use of sex-segregated mortality tables does not occur with respect to any particular plan participant until the day that the participant retires. *Id.* Prior to that day, the participant is treated in an entirely sex-neutral fashion by the plan: the contribution aspect of the plan is identical for men and women, *id.* at 1300; moreover, the plan does not promise that, on the day of the participant's retirement, any particular mortality tables will be used to calculate the benefits to which the participant is entitled, *id.* at 1316 n.28. Thus, when the Court entered the *Spirt* judgment on September 18, 1979, CREF had not, *in the past,* performed any unlawful discriminatory act with respect to any plan participant who would retire on or after May 1, 1980. The *Spirt* judgment thus did nothing more than order CREF not, *in the future,* to perform any unlawful act with respect to any plan participant who would retire on or after May 1, 1980. The *Spirt* judgment said nothing with respect to any other plan participant. Thus, the *Spirt* judgment does not subject CREF to a liability or punishment on account of any discriminatory acts committed by CREF *prior to* the entry of the *Spirt* judgment. Consequently, neither of the statutory sections relied upon by TIAA and CREF in support of their proffered good faith reliance defense is applicable in the *Spirt* action. The TIAA-CREF motion for partial relief from the *Spirt* judgment is accordingly denied.

CONCLUSION

The motions that are decided by today's opinion are disposed of as follows: (1) The EEOC's motion in 74 Civ. 1674(RJW) for leave to intervene in 74 Civ. 1674(RJW) is granted in part and denied in part. (2) The EEOC's motion in 74 Civ. 1674(RJW) for summary judgment against Superintendent Lewis is denied. (3) The EEOC's motion in 74 Civ. 1674(RJW) for an order consolidating 74 Civ. 1674(RJW) with 81 Civ. 881(RJW) for all purposes is denied. (4) The EEOC's motion in 81 Civ. 881(RJW) for an order consolidating 81 Civ.

881(RJW) with 74 Civ. 1674(RJW) for all purposes is denied. (5) The Moshowitz-Alexion-Clynes motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (6) The Moshowitz-Alexion-Clynes motion in 81 Civ. 881(RJW) for summary judgment against Superintendent Lewis is denied. (7) The AAUP's motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (8) The ANA's motion in 81 Civ. 881(RJW) for leave to intervene in 81 Civ. 881(RJW) is denied. (9) The AAUP's motion in 74 Civ. 1674(RJW) for leave to intervene in 74 Civ. 1674(RJW) is granted in part and denied in part. (10) Spirt's motion in 74 Civ. 1674(RJW) for summary judgment against Superintendent Lewis is denied. (11) The TIAA-CREF motion in 74 Civ. 1674(RJW) to dismiss Spirt's supplemental complaint is granted. (12) The TIAA-CREF motion in 74 Civ. 1674(RJW) for relief from the final judgment entered by the Court in 74 Civ. 1674(RJW) is denied.

The only pending motion in 74 Civ. 1674(RJW) or 81 Civ. 881(RJW) that is not decided by today's opinion is the EEOC's motion in 81 Civ. 881(RJW) for summary judgment against Superintendent Lewis. Superintendent Lewis shall serve and file his opposition to this motion within twenty (20) days of the date of this opinion. The other defendants in 81 Civ. 881(RJW) shall serve and file any comments they have on this motion within the same period of time. The EEOC, and *amici curiae* in 81 Civ. 881(RJW), shall have ten (10) days from the date such opposition is received to serve and file any reply papers they may wish to present.

It is so ordered.

Judgment of The Court of Appeals

DIANA SPIRT,

Plaintiff-Appellant-Cross-Appellee,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Intervenors-Appellees,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants-Cross-Appellants-Appellees.

Nos. 79-7715, 79-7737, 79-7739

United States Court of Appeals,

Second Circuit

September 29, 1982

Present:

HON. JON O. NEWMAN,
HON. LAWRENCE W. PIERCE, *Circuit Judges,*
HON. JOHN M. CANNELLA, *District Judge.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

/S/ ARTHUR HELLER
by Arthur Heller,
Deputy Clerk

Order and Judgment of the District Court

DIANA SPIRT,

Plaintiff,

—v.—

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, COLLEGE RETIREMENT EQUITIES FUND, LONG ISLAND UNIVERSITY, and ALBERT B. LEWIS,

Defendants.

No. 74 Civ. 1674

United States District Court,

Southern District of New York

September 17, 1979

This cause having come on to be heard on motion of plaintiff Diana L. Spirt ("Spirt") and cross-motion of defendants Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings and prior proceedings in the action, the Stipulation of Facts of plaintiff and defendants TIAA and CREF dated April 21, 1977, as modified by the Stipulation of plaintiff Spirt and defendants TIAA and CREF, dated June 8, 1977, the affidavits of Kenneth D. Wallace, dated May 17, 1977 and June 6, 1977, the affidavit of Francis A. McGrath, dated May 13, 1977 and the affidavit of Ralph Munoz, dated March 17, 1977, all in support of plaintiff's motion and the affidavits of William C. Greenough, dated August 19, 1975, May 18, 1977 and June 28, 1978, the affidavits of Robert M. Duncan, dated August 19, 1975 and December 2, 1975 and the affidavit of Thomas Walsh dated June 8, 1977, all in support of defendants' cross-motion

and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that plaintiff Spirt is entitled to judgment as a matter of law as to defendant CREF and defendant Long Island University ("LIU") and that defendant TIAA is entitled to a judgment as a matter of law, it is hereby

ORDERED, that plaintiff's motion for a summary judgment is granted as to CREF and denied as to TIAA, and it is further

ORDERED, that defendant CREF's motion for a summary judgment is denied, and it is further

ORDERED, that defendant TIAA's motion for a summary judgment is granted and the action against it be and the same hereby is dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that defendant CREF be, and it hereby is permanently enjoined and restrained on and after May 1, 1980 from violating the provisions of Section 703(a)(1) of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-2(1)] hereinafter called the Act, by using sex-based mortality tables in calculating the number of annuity units to which plaintiff and its other deferred annuitants are entitled under its variable annuity plans, and it is further

ORDERED, ADJUDGED AND DECREED that defendant LIU be and it hereby is permanently enjoined and restrained on and after June 1, 1980 from violating the provisions of Section 703(a)(1) of the Act in any of the following manners: LIU shall not make contributions on behalf of its employees or require its employees to contribute to any retirement plan that uses sex-based mortality tables in calculating periodic benefits, and it is further

ORDERED, that the time to make any application for attorney's fees be and the same hereby is extended until thirty (30) days after the time to file an appeal from this Order and Judgment or, in the event of an appeal, until thirty (30) days after the mandate on remand.

Dated: September 17, 1979

/S/ ROBERT J. WARD
United States District Judge

Opinion of the Sixth Circuit
in *Peters* v. *Wayne State University*

MILDRED PETERS, et al.,

Plaintiffs-Appellees,

—v.—

WAYNE STATE UNIVERSITY (79-1670), TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND (79-1658, 79-1671),

Defendants-Appellants.

Nos. 79-1658, 79-1670, 79-1671

United States Court of Appeals,
Sixth Circuit

October 14, 1982

Before:

MARTIN, *Circuit Judge*;
PHILLIPS and BROWN*, *Senior Circuit Judges.*

BOYCE F. MARTIN, JR., *Circuit Judge*

This case requires us to decide whether Title VII prohibits an insurance company from operating or an employer from selecting a retirement benefits plan under which the size of monthly annuity payments is calculated from sex-segregated mortality tables. Wayne State University offers its faculty and certain other employees an annuity pension plan administered by

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

Teachers Insurance and Annuity Association and the College Retirement Equities Fund. Under this plan, female annuitants receive smaller monthly payments than similarly situated male annuitants. This distinction is based on the actuarial probability that women will live longer than their male counterparts.

The plaintiffs, female employees of Wayne State, brought this sex discrimination action in the District Court for the Eastern District of Michigan. The District Court found that both Teachers Annuity and Wayne State had violated section 703(a) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a). *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D. Mich. 1979). We disagree and reverse.

Wayne State is a state-supported university located in Detroit, Michigan. Teachers Annuity is a pair of companies designed specifically to serve the unique retirement needs of academic employees. Teachers Insurance and Annuity Association is a legal reserve life insurance company; College Retirement Equities Fund is a companion corporation organized to provide a greater variety of insurance services. Teachers Annuity enables employees of academic institutions to move from one institution to another because the employees take their personal retirement contracts with them as they move. Five hundred fifty thousand employees at over three thousand institutions contract directly with Teachers Annuity for retirement annuity benefits.

Wayne State does not require its employees to participate in the Teachers Annuity retirement plan. Employees who choose to do so contribute to the fund five percent of their salaries matched by a ten percent Wayne State contribution. Each contribution automatically purchases retirement benefits which vest immediately and irrevocably in the individual employee. At retirement, employees must select among several annuity payment options.

If a woman selects a "single life option," which provides monthly payments for life, she will receive smaller payments than a man of the same age and accumulated contributions. Teachers Annuity computes the annuities from standard mor-

tality tables which reflect the fact that, as groups, women live longer than men. At age sixty-five a woman's life expectancy is four years longer than a man's. To compensate for women's longevity, female annuitants receive smaller monthly payments. However, the present actuarial values of women's and men's benefits are identical.

The District Court found that both Teachers Annuity and Wayne State violated Title VII. Although women and men *as groups* received equal benefits, the District Court relied on *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), to find that the retirement plan discriminated against the *individual* female annuitant.

Section 703(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer*—
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex . . . .

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Federal courts have construed the statutory language to include, as employers, employers' agents and those to whom employers have delegated responsibility for employee compensation. As the Supreme Court noted in *Manhart*, "[A]n employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718, n.33.

In the present case, the District Court found that Teachers Annuity was an "employer" within the meaning of Title VII because "[t]he ties between WSU and TIAA/CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. The court emphasized the fact that Teachers Annuity's "sole reason" for existence was to provide individually vested insurance contracts to employees of educational institutions.

The District Court's characterization of Teachers Annuity as an "employer" is clearly erroneous. Fed. R. Ap. P. 52(a). Obviously Teachers Annuity does not "employ" the plaintiffs in the conventional sense of the word. Neither does Wayne State retain Teachers Annuity as an agent or delegate to it any aspect of employee compensation. *See Los Angeles v. Manhart*. On the contrary, Wayne State determines the eligibility requirements for participation in the Teachers Annuity plans and sets the contribution levels for itself and its employees. Teachers Annuity's responsibility is limited to management of the retirement fund and disbursement of individual annuities. Furthermore, Wayne State exercises no control over Teachers Annuity, otherwise essential to a principal agent relationship. *NLRB v. Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F.2d 1335, 1366 (6th Cir. 1974). *See generally* 2A C.J.S. Agency § 6; Restatement (Second) Agency § 14. Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity plan. Indeed, the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone. Wayne State has repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy.

Teachers Annuity is not an "employer" for the purposes of Title VII; Wayne State has selected Teachers Annuity's retirement planning services for its employees. Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

An insurance company is not bound by Title VII because it furnishes its services to a Title VII employer. The reverse is not true. A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to

discriminate against women. Wayne State emphasizes that Teachers Annuity's acts are lawful, that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees. Accordingly, Wayne State would be liable under Title VII if Teachers Annuity's plan discriminated against female annuitants. We hold, however, that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

"It is well established under Title VII that claims of employment discrimination . . . may arise in two different ways." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-582 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either "disparate treatment" or "disparate impact." "The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others *because of* their . . . sex.' " *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

The District Court determined that Wayne State had violated Title VII without first finding either "disparate treatment" of women by Wayne State or a "disparate impact" on women of a Wayne State policy. Rather, the court relied *solely* on the holdings and dicta of *Manhart. Peters*, 476 F. Supp. at 1349. *See also Spirit v. TIAACREF*, Nos. 79-7715, 7737, and 7739 (2d Cir. decided Sept. 29, 1982); *EEOC v. Colby College*, 589 F.2d 1139 1st Cir. 1978). Careful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact. In short, there is no evidence that Wayne State treats women less favorably than men *because of* their sex.

Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting

with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. at 579-580. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. *Id.* at 254, *citing Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate non-discriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.

Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne

State has not violated Title VII according to a disparate treatment analysis.

Neither has Wayne State violated Title VII according to a disparate impact analysis. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. "[P]ractices that are fair in form, but discriminatory in operation" produce a "disparate impact." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose. *Griggs*, 401 U.S. at 431.

Plaintiffs in this case claim that Wayne State's retirement plan has a disparate impact on women because women receive smaller monthly annuity payments than men. Plaintiffs focus on one fact, that the monthly checks received by women and men differ; they disregard all other aspects of the retirement plan. The District Court's focus and conclusion agreed with the plaintiffs'. "[T]he use of separate mortality tables . . . is discriminatory as applied to an individual woman annuitant." 476 F. Supp. at 1349. Both the District Court and the plaintiffs rely solely on *Los Angeles v. Manhart* for the proposition that "employer pension plans must be non-discriminatory on an individual basis, rather than on class basis." *Id.*

In *Manhart* the Supreme Court invalidated Los Angeles' retirement programs because the city required women to contribute more than men to receive equal retirement benefits. The difference in contribution rates stemmed from standard mortality tables reflecting the fact that women as a group live longer than men as a group. The city deducted the contributions directly from all employees' paychecks. The Court acknowledged the validity of the mortality tables but declared that Title VII protects *individuals*, not groups. The Court found the city liable for sex discrimination against each individual woman who received less take-home pay than a man for the same job.

Two significant factual differences exist between *Manhart* and the present case. In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

These factual differences are significant because the Supreme Court expressly limited its *Manhart* holding along these lines: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The Court's primary concern, that women received smaller paychecks for the same work, is not a factor in the present case.

Two landmark industrial benefits cases preceded *Manhart*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *reh. denied*, 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974). In both these cases the employer offered a disability benefits plan which excluded pregnancy as a disability. The Supreme Court found no sex discrimination under Title VII, in *Gilbert*, or under the Equal Protection Clause, in *Geduldig*. The plaintiffs failed to demonstrate either disparate treatment or a disparate impact from the exclusion of pregnancy as a disability.

Like *Gilbert* and *Geduldig*, the present case concerns a benefit plan, not employee wages. In all three cases, the employers paid or required equal contributions for both women and men. Justice Rehnquist's analysis in *Gilbert* quoting *Geduldig* controls the present case:

> As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U.S., at 497 n.20.
>
> * * *
>
> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id., at 496-497 . . . .
>
> As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*

429 U.S. at 138-139 (citations and footnotes omitted) (emphasis added). For the same reasons we hold that Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.

Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Gender neutral tables would not "equalize" the treatment of women and men. If annuities were calculated on gender neutral tables, women and men would receive equal payments. However, Wayne State would have to contribute more to a

woman's retirement fund than to a man's. Consequently men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men.

The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas*, 411 U.S. at 806, *quoting Griggs*, 401 U.S. at 431. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Because our decision on the issue of Title VII liability disposes of the case, we need not address the other issues raised by the parties.

The decision of the District Court is reversed.

The McCarran-Ferguson Act, Sections 1 and 2;
15 U.S.C. §§ 1011, 1012 (1976):

Section 1 (15 U.S.C. § 1011):

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2 (15 U.S.C. § 1012):

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Title VII of the Civil Rights Act of 1964, Sections 703(a)(1), 706(g) and 713(b); 42 U.S.C. §§ 2000e-2(a)(1), 5(g), and 12(b) (1976):

Section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)):

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Section 706(g) (42 U.S.C. § 2000e-5(g)):

> (g) . . . Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. . . .

Section 713(b) (42 U.S.C. § 2000e-12(b)):

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial author-

ity to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Portal-to-Portal Act, 29 U.S.C. § 259 (1976):

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor; . . . .

82-791

No. 82-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR CERTIORARI

WILLIAM R. GLENDON
(Counsel of Record)

JAMES B. WEIDNER
JAMES W. PAUL

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

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IN THE

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Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR CERTIORARI

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") move for expedited consideration of their petition for certiorari filed in this action today. As grounds therefor, petitioners state that the Court has granted certiorari in *Norris* v. *Arizona Governing Committee*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), which case involves application of this Court's decision in

Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978). The *Spirt* case also involves *Manhart* and a particularly direct conflict among the Circuits as to its proper application to petitioners' pension system. Petitioners believe that any application or clarification of *Manhart* should be heard in light of the broader scope of the instant case which presents different and more complex issues relating to *Manhart* than does *Norris*. Accordingly, we urge that TIAA-CREF's petition for certiorari be granted expedited consideration so that, if it be granted, the *Spirt* case may be heard at the same time as *Norris*.

REASONS FOR EXPEDITING CONSIDERATION OF THE PETITION

TIAA and CREF are independent insurers offering insurance and annuity contracts to employees of educational and research institutions through insured pension plans. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Since 1974, TIAA-CREF have been involved in a number of actions raising claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1976 & Supp. IV 1980), growing out of its use of sex-distinct mortality tables to compute annuity benefits. The issue arises because the use of such tables, standard practice in the insurance and pension industry, gives due recognition to the greater longevity of women as a group. Given equal annuity contributions, it is thus necessary to pay periodic benefits at a lower rate to the women than to similarly situated men in order not to exhaust the funds contributed by the women while some of them are still living. There are now pending some nine cases in various federal

courts against TIAA-CREF involving this issue, and three courts of appeals have passed upon TIAA-CREF cases.

As TIAA-CREF's petition points out, there is now a square conflict between the Sixth Circuit (in *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671 (6th Cir. October 14, 1982)) and the Second Circuit (in *Spirt*) concerning the application of Title VII and the *Manhart* decision to TIAA-CREF. As a result of the *Spirt* decision in the Second Circuit, TIAA-CREF is prohibited* nationwide from using sex-distinct mortality tables in calculating annuity benefits on the ground that their use is discriminatory under Title VII. At the same time, the Sixth Circuit has held that the use of these tables is entirely lawful under that statute. A prompt resolution of this conflict is urgently required by TIAA-CREF, their 700,000 participants and 3,400 participating institutions.

That there is a need for guidance and clarification of *Manhart* seems clear. As the First Circuit said in *EEOC* v. *Colby College*, 589 F.2d 1139, 1143 (1st Cir. 1978), "[w]hether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." The large number of cases involving *Manhart* and their varying rationales serve but to emphasize this point (*see* Petition at 13 n.5). The problem arises, as was noted in *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), "from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." A decision in the *Norris* case will doubtless require an interpretation of *Manhart*, but *Norris* essentially focuses

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* The Second Circuit's mandate has been stayed pending disposition of the accompanying petition.

on: (1) the "open market" exception of *Manhart* (435 U.S. at 717-18), an issue not involved here, and (2) on a deferred compensation plan rather than on a pension plan. We believe that the *Spirt* and *Peters* cases present a much broader range of issues against which the Court can also re-examine, clarify, and apply *Manhart*.

The focus of *Norris* is quite different from that in *Spirt* and *Peters*. *Spirt* and *Peters* present an insurer's justification for the use of sex-distinct mortality tables. No insurer is involved as a party in *Norris*. *Spirt* and *Peters*, but not *Norris*, present the question whether an independent insurer is the "employer" of its annuitants within the meaning of Title VII. The applicability of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1976), is not raised in *Norris*. In *Spirt* and *Peters*, however, TIAA-CREF claim that the subject risk classification practices constitute the "business of insurance" and that they, and thus their participating institutions, are exempted by McCarran from Title VII coverage. Most importantly, *Spirt* raises very substantial questions of retroactive application of *Manhart*, an issue not raised in the *Norris* petition. Indeed, even the requirement of showing discriminatory intent under Title VII, presented by both *Norris* and *Spirt*, requires the examination of somewhat different contentions in those two cases.

The questions raised by *Spirt* are questions of enormous import not only to the petitioners but to the insurance industry at large. The use of sex-distinct tables is a standard actuarial practice throughout the industry. Use of such tables proceeds not from any purpose to discriminate but, as the *Peters* court found, because the usage is required and supported by "common sense." TIAA-CREF, and the insurance industry as a whole, seek clarification as to the parameters of this Court's state-

ment in *Manhart*, 435 U.S. at 717, that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." We believe the need for clarification can best be met by granting certiorari in *Spirt* and setting it down for argument at the same time as *Norris*.

We are authorized to state that the plaintiff Spirt and the Superintendent of Insurance of the State of New York have no objection to the granting of the writ and agree, if certiorari be granted, that argument in *Spirt* should be scheduled on the same date as that in *Norris*.* The respondent Long Island University authorizes us to state that it is in favor of a grant of certiorari in this case. It agrees with TIAA-CREF's position that the *Spirt* case should be heard at the same time as *Norris*. It wishes to submit its views on certiorari to the Court and advises it will do so as expeditiously as possible.

There are two other parties with tangential standing. While the *Spirt* case was on remand, in 1981, seven years after the case was brought, the Equal Employment Opportunity Commission ("EEOC") and the American Association of University Professors ("AAUP") sought to intervene. The District Court denied the general intervention sought by the EEOC, but did permit partial intervention as to both limited to one question relating solely to relief. The AAUP, we understand, opposes certiorari. We are not advised as to the position of the Solicitor General respecting the EEOC.

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* Plaintiff supports the result reached by the Second Circuit and reserves her position on the merits.

CONCLUSION

For all the foregoing reasons, petitioners pray that the Court grant expedited consideration to their petition, and if certiorari be granted, as urged in the petition, that the case be set down to be heard on the same date as *Norris*.

Respectfully submitted,

/s/ William R. Glendon
WILLIAM R. GLENDON
(Counsel of Record)

JAMES B. WEIDNER
JAMES W. PAUL

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

November 9, 1982

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No. 82-791

IN THE

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OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *and* COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA SPIRT, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

LAWRENCE WHITE
(Counsel of Record)
DAVID M. RABBAN
ANN H. FRANKE
1 Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050

JOHN L. POTTENGER, JR.
Yale Law School
New Haven, CT 06520

Counsel for the American Association of University Professors

Of Counsel:
RALPH S. SPRITZER
University of Pennsylvania Law School
Philadelphia, PA 19174

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as construed by this Court in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), prohibit an employer from requiring employees to participate in a jointly funded retirement benefit plan that pays a smaller periodic retirement benefit to a female retiree than to a male retiree of the same age with a comparable employment history?

2. In light of the reasons for which the petitioners were established as educational service organizations, the close mutual dependence between the petitioners and participating educational institutions, and the broad remedial purposes for which Congress enacted Title VII, did the court below correctly determine that the petitioners should be treated as "employers" within the meaning of that term in Title VII?

3. Did the orders of the courts below requiring the petitioners prospectively to equalize periodic retirement benefits for men and women who retire in the future constitute retroactive relief proscribed by *Manhart*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-791

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *and*
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors ("AAUP") believes that the decision below was required by this Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). We urge, for the reasons more fully set forth below, that the petition for certiorari filed by the Teachers Insurance and Annuity Association ("TIAA") and the College Retirement Equities Fund ("CREF") should be denied unless the Court concludes that it is appropriate to grant

plenary review in *Peters v. Wayne State University*,[1] a closely related case also pending on petition for a writ of certiorari.

It is indisputable that the decision in *Peters* cannot be reconciled with the decision of the court below in this case. This conflict between the circuits, however, does not require plenary consideration because the points upon which the two circuit courts disagreed have already been decided in *Manhart*. In our brief *amicus curiae* in support of the petition in *Peters*, the AAUP and other *amici* suggested that an appropriate disposition there would be to grant the petition and reverse summarily on the strength of *Manhart*.[2] If the Court adopts that suggestion, the instant petition should be denied.

STATEMENT OF THE CASE

In two respects, the petitioners' statement calls for supplementation.

One relates to the history and current configuration of the TIAA-CREF annuity system. The petitioners describe themselves as "independent insurers" having no employer-employee relationship with their annuitants,[3] an assertion vital to their legal contention that they should not be deemed "employers" as that term is used in Title VII of the Civil Rights Act of 1964.[4] In fact,

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[1] *Petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794).

[2] The text of the *amicus* brief in *Peters* is reproduced for the Court's convenience in the Appendix to this memorandum.

[3] Pet. i, 16. (As used in this footnote and hereinafter, the abbreviation "Pet." refers to the petition for certiorari filed by TIAA and CREF in this Court; the abbreviation "Pet. App." refers to the appendix accompanying the petition for certiorari; the abbreviation "J.A." refers to the Joint Appendix submitted by the parties in the court below; and the word "Appendix" refers to the appendix reproduced at the end of this memorandum.)

[4] 42 U.S.C. § 2000e *et seq.* (1976 and Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

the history of the TIAA-CREF annuity system and the manner in which the system is currently structured suggest a more intimate relationship between the petitioners and their annuitants than the one described in the petition. The relationship is sufficient, under well-established judicial interpretations of Title VII, to subject TIAA and CREF to the strictures of that statute.

The other omission in the petitioners' statement involves the facility with which pension plan managers (including TIAA and CREF) have designed plans substituting unisex mortality tables for the sex-differentiated tables declared illegal by the lower courts in this case (and by courts in at least nine other cases)[5]—a fact that undermines the petitioners' assertion that the Second Circuit's decision in this case would "invite chaos in the insurance and pension industry. . . ."[6]

A. *The TIAA-CREF Annuity System.* The history of TIAA and CREF and the facts about their national retirement benefit system belie the petitioners' description of themselves as "independent insurers." TIAA and CREF provide annuity benefits to faculty members at most institutions of higher education in the United States. In all, 3,400 colleges and universities have coordinated the design and administration of their retirement programs with TIAA-CREF, creating what the petitioners have called a "national pension system of [American] higher education."[7]

The TIAA-CREF system was originally conceived and is today operated as a financial service designed to make careers in higher education more attractive and financially rewarding.[8] During World War I, the Carnegie

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[5] *See* note 28, *infra*, and accompanying text.

[6] Pet. 16.

[7] J.A. 330, 415.

[8] J.A. 172, 226, 251-54, 329. *See* W. Greenough & F. King, BENEFIT PLANS IN AMERICAN COLLEGES 8-9, 13-14, 39-49 (1969) [hereinafter cited as "BENEFIT PLANS"].

Foundation for the Advancement of Teaching established a Commission on Insurance and Annuities to examine the shortcomings in institutional pension plans then available to college and university faculty members. The Commission, consisting of representatives from the AAUP and several other educational organizations, recommended the establishment of a national pension system for employees of educational institutions.[9] TIAA was incorporated in 1918 by the trustees of the Carnegie Foundation, and was operated for many years as a subsidiary of the Foundation "with its stock held and voted by the Carnegie Corporation as a trust for the college world. . . ." [10]

TIAA and CREF are non-profit corporations that provide retirement benefit plans for faculty members and staff employees at institutions of higher education throughout the United States. TIAA-CREF annuities cannot be purchased on the open market. Individuals are eligible to enroll only if they work for an eligible institution.[11]

Each plan in the TIAA-CREF system is established by resolution of the educational institution's governing board. The institution determines for itself, in consultation with TIAA and CREF, what provisions on eligibility, participation, contributions, and retirement it wishes to include in its plan. These provisions are spelled out in the

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[9] J.A. 172, 226. The Carnegie Foundation's early involvement is described in Peters v. Wayne State University, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, Nos. 79-1658, 79-1670 & 79-1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). The members of the Commission saw two advantages to the creation of a national system: an economy of scale that would reduce the cost of annuities by eliminating agents' commissions, and portability of coverage for faculty members who moved to new institutions. *Id. See also* BENEFIT PLANS 8-14.

[10] *Peters, supra*, 476 F. Supp. at 1346. The petition here (at 3-4) describes the circumstances of CREF's incorporation.

[11] J.A. 226, 238, 470, 473.

institution's enabling resolution.[12] At many institutions (including Long Island University, the institution whose plan is challenged in this case), tenured faculty members are required to participate in the TIAA-CREF plan and must, therefore, depend on TIAA-CREF for investment and payment services.[13]

TIAA-CREF's mission is inseparable from the mission of the institutions it serves. TIAA-CREF could not function without the administrative and financial support it receives from those institutions. To call TIAA-CREF an "independent" insurer is to oversimplify its mutually dependent relationship with college and university employers.

B. *The Development of Unisex Tables.* The petition implies that the substitution of a single mortality table for the sex-differentiated tables now used by TIAA and CREF would have grave consequences for the insurance industry.[14] The petition fails to note, however, that TIAA and CREF developed no fewer than *three* unisex tables during proceedings in the lower courts, and that at least one major institution—the University of Minnesota—has had no difficulty finding insurance companies willing to use a unisex table to provide equal periodic annuity benefits for male and female retirees.

After the trial court's decision enjoining the use of sex-differentiated tables, TIAA and CREF designed three unisex plans as part of settlement discussions with the plaintiffs.[15] In correspondence with the New York State Department of Insurance in early 1980, Thomas G. Walsh, TIAA-CREF's Vice President, provided data

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[12] The procedure for establishing a TIAA-CREF plan is described in BENEFIT PLANS, *supra* note 8, at 40. *See also* J.A. 188-193 (Long Island University's "Retirement Resolution").

[13] J.A. 188.

[14] Pet. 8, 16.

[15] This history is recounted in one of the trial court opinions, Pet. App. 84a-85a, and in the Second Circuit's opinion, Pet. App. 8a.

showing that a unisex plan could be implemented without significant cost increases and without any loss of institutional participants.[16] The data were developed, Mr. Walsh wrote, "to assure ourselves that the adoption of these merged gender mortality tables will be actuarially sound." [17] These data, so persuasive to TIAA and CREF two years ago, are the best answer to the assertion in their petition that periodic benefits "must" be lower for women to avoid exhausting funds accumulated in their names.[18]

Recently, the University of Minnesota replaced its TIAA-CREF retirement plan with a new plan designed and administered by two private insurance companies (Minnesota Mutual Life Insurance Company and Northwestern National Life Insurance Company) using a unisex table to calculate retirement benefits.[19] Adoption of the new plan was prompted by concerns among male and female faculty members that lower periodic annuity payments for female annuitants were unfair and unnecessary.[20]

Retirement plans using unisex mortality tables are not difficult to design. The willingness of several companies (including TIAA and CREF) to consider such plans plainly indicates that the relief ordered in this case is appropriate.

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[16] Letter from Thomas G. Walsh, Vice President and Actuary of TIAA-CREF, to James Gardiner, Supervising Actuary in the New York State Insurance Department, Jan. 11, 1980. This letter appears in the record as Exhibit GG to the Equal Employment Opportunity Commission's "Rule 9(g) Statement of Material Facts Not in Dispute" in the District Court. (A copy of this letter is also reproduced in the Appendix following this memorandum.)

[17] Appendix 11a.

[18] Pet. 5.

[19] "U. of Minnesota Adopts Unisex Plan for Pensions: 'Right Thing to Do,'" CHRONICLE OF HIGHER EDUCATION, Oct. 13, 1982, at 25.

[20] *Id.*

SUMMARY OF ARGUMENT

The petitioners acknowledge that sex is the sole criterion used in determining the amount of periodic annuity payments made to male and female retirees whose situations are otherwise indistinguishable. While they argue that there are actuarial justifications for treating female employees differently from their male counterparts, the same asserted justifications were rejected in *Manhart*. As the Court there ruled, Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." 435 U.S. at 708.

The relief ordered by the District Court and Court of Appeals does not constitute impermissible "retroactive relief." The orders are prospective in effect. They do not involve back pay awards, do not diminish in any way the assets or obligations of the petitioners, and do not implicate any of the equitable or practical concerns noted in *Manhart*.

Although the decision of the court below conflicts with the decision of the Sixth Circuit Court of Appeals in *Peters v. Wayne State University*, upholding the use of sex-based mortality tables, *Peters*, in our view, cannot be reconciled with *Manhart*. We have accordingly suggested that summary reversal of the *Peters* decision would be appropriate. If the Court adopts that course, the instant petition should be denied. If, however, the Court should grant plenary review in *Peters*, it should also grant the petition here in order to consider the two conflicting decisions together.

ARGUMENT

I. The instant petition brings to four the number of cases pending before the Court in which retirement plans that pay smaller periodic benefits to female annuitants than to their male counterparts are challenged under Title VII.[21] They are the first pension discrimination cases to reach the Court since the decision in *Manhart*.[22] There, the Court held that an employer-operated pension plan providing equal periodic benefits to retirees of both sexes violated Title VII by requiring female participants to make significantly greater periodic contributions during their worklives than comparably situated male participants.

The employer in *Manhart* attempted to justify the disparity by arguing that there were sound actuarial reasons for treating female employees as a class differently from the class of male employees. The Court rejected that defense:

> [Title VII] makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.
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[21] Petitions were filed earlier this year in Peters v. Wayne State University, *supra* note 1; California v. Retired Public Employees' Ass'n, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); and Arizona Governing Comm. v. Norris, 51 U.S.L.W. 3187 (U.S. July 12, 1982) (No. 82-52). The petition in the latter case was granted in October. 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982).

[22] City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address . . . . Even if the statutory language were less clear, *the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.*[23]

Manhart holds that justifications premised on the asserted characteristics of women as a class do not permit an employer to require larger periodic pension contributions from female employees than from their male counterparts. TIAA and CREF now offer the same justifications in support of a form of discrimination no less substantial in its impact. Instead of requiring women to make *larger* periodic *contributions* during their worklives in order to receive the same periodic benefits as males upon retirement, TIAA and CREF ask men and women to make the same periodic contributions while they work, but then pay women *smaller* periodic *benefits* after retirement.[24]

Their reasons for treating women differently are precisely the same as the reasons rejected by this Court in *Manhart*. The petitioners argue that future annuitants must be "grouped" according to "stable, significant and objectively measurable risk classification factors," of

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[23] 435 U.S. at 708, 709 (emphasis added). *Manhart's* "focus on fairness to individuals rather than fairness to classes" is reinforced by Section 703(a)(2) of the Civil Rights Act of 1964, as amended, which makes it unlawful for an employer to "classify" employees on the basis of sex. 42 U.S.C. § 2000e-2(a)(2) (1976). *Cf.* Connecticut v. Teal, 50 U.S.L.W. 4716 (U.S. June 21, 1982) (No. 80-2147).

[24] Under the TIAA-CREF plan in effect at Long Island University, the disparity between male and female annuitants is substantial. Asume that two faculty members, one male and one female, retire at age 65, each with an accumulation of $100,000. Under a single life annuity plan, the male retiree would receive $11,964 per annum. The female retiree would receive $10,740—more than $1,200 less. J.A. 183. TIAA and CREF estimate that, on the average, male annuitant benefits under the single life option exceed female annuitant benefits by 11.3 percent per payment. J.A. 182-83.

which there happen to be two—age and sex.[25] It was precisely this kind of "grouping" that the Court rejected in *Manhart* when it declared that Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." [26]

If Title VII prohibits an employer from invoking class characteristics to justify *larger contributions* from women, it follows that those characteristics cannot justify *smaller benefits* for women. In either case, individual women suffer adverse consequences solely because they are members of a statutorily protected class. "In fact," the court below observed, ". . . it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII." [27]

Until the Sixth Circuit's decision in *Peters*, every court considering the issue rejected TIAA-CREF's proposed dis-

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[25] Pet. 5. There is a significant legal distinction, for current purposes, between employment classifications based on age and employment classifications based on sex. Both, in broad terms, are proscribed by federal law, the former by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (1976 & Supp. IV 1980) (the "ADEA"), and the latter by Title VII. But the proscription in the ADEA does not apply to employee benefit plans, including retirement benefits. *See* ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). There is no equivalent exemption in Title VII. To the contrary, this Court held in *Manhart* that retirement benefit plans violate Title VII when administered on the basis of sex-based classifications. *See generally* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 536-39 (1980).

There is a significant factual distinction as well, insofar as this case is concerned. TIAA and CREF have admitted that age, not sex, is "the major factor" they rely upon in setting the level of annuity benefits. J.A. 320, 530.

[26] 435 U.S. at 708.

[27] Pet. App. 11a.

tinction between unequal contributions and unequal benefits, and held that *Manhart* prohibited the payment of smaller periodic retirement benefits to women.[28] The decision of the court below in this case is consistent with this line of cases and with *Manhart*.

Even if notions of actuarial "fairness" were germane under Title VII, it is far from clear that equity would compel the use of sex-differentiated actuarial tables. As at least four lower courts have noted, such notions may produce a result that is far from equitable for the vast majority of working women. Although women have a longer life expectancy than men, the difference is attributable to the small fraction of the female population who live especially long and the small fraction of the male population who die especially young. The vast majority of men and women participating in the TIAA-CREF system die at comparable ages, regardless of their sex.[29] For most women, therefore, a smaller monthly pension will

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[28] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, 29 Fair. Empl. Prac. Cas. (BNA) 1599 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791); Retired Public Employees' Ass'n v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F.Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F.Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds).

[29] In a matched group of 2,000 similarly situated male and female retired teachers (1,000 males and 1,000 females), 798 women will die at the same age as 798 of the men. J.A. 351-52.

generate less money over the course of their lifetimes than most men will earn. "As a result, each woman is penalized because a few women live longer and each man benefits because a few men die early." *Henderson v. Oregon*, 405 F.Supp. 1271, 1275 n.5 (D. Ore. 1975).[30]

Notions of actuarial "fairness" are in fact more difficult to formulate and apply than TIAA and CREF have suggested in their petition. But the point that bears repeating is that under *Manhart* such notions are not germane to begin with when invoked as justifications for discrimination against the members of a statutorily protected class. "Even a true generalization about the class," observed the Court in *Manhart*, "is an insufficient reason for disqualifying an individual to whom the generalization does not apply." [31]

II. In two respects, the decision of the Second Circuit in this case conflicts with the Sixth Circuit's decision in *Peters*. First, the court in *Peters* ignored the admonition in *Manhart* to "focus on fairness to individuals rather than fairness to classes," 435 U.S. at 709, and held that the TIAA-CREF plan did not discriminate against women annuitants because the aggregate "value of the retirement plan" for women as a class did not exceed the plan's

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[30] *Accord*, Norris v. Arizona Governing Committee, 671 F.2d 330, 332 n.1 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 585 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, 176, *cert. denied*, 434 U.S. 825 (1977).

For a full discussion of the actuarial arguments on which TIAA and CREF rely, *see* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 511-514 (1980); Key, *Sex-Based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1 (1979); Kimball, *Reverse Sex Discrimination*: Manhart, 1979 AM. B. FOUNDATION RESEARCH J. 83.

[31] 435 U.S. at 708.

value for men as a class.[32] Second, the Sixth Circuit became the nation's first court to declare that TIAA and CREF should not be treated as "employers" within the meaning of that term in Title VII.[33] On both counts, however, *Manhart* is dispositive.

A. *Reliance on Actuarial Distinctions.* The Sixth Circuit rested its decision on the comparative characteristics

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[32] Pet. App. 141a.

[33] 139a.

The instant petition seeks review of the Second Circuit decision on two other grounds: the applicability of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976), and the pertinence of discriminatory intent under Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and Furnco constr. Corp. v. Waters, 438 U.S. 567 (1978). Strictly speaking, however, the Sixth Circuit and Second Circuit decisions are not in conflict on either point, because the Sixth Circuit's opinion in *Peters* does not address the former issue and the Second Circuit's opinion in this case does not address the latter.

The Second Circuit's treatment of the McCarran-Ferguson Act is complete and correct. Moreover, the decision is entirely supportable on the separate ground that TIAA and CREF so coordinate their insurance activities with the actions of the educational institutions they service that any insulation from liability otherwise provided by the McCarran-Ferguson Act has been waived. *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231-33 (1979).

Although the Sixth Circuit's reliance on *Furnco* and *Burdine* does not conflict with any portion of the Second Circuit opinion in this case, the Sixth Circuit's decision does conflict with the decision of the Ninth Circuit in *Norris*. *Compare* Pet. App. 141a (Sixth Circuit holding that the plaintiff failed to make the showing of discriminatory intent purportedly required by *Burdine*) *with Norris, supra* note 28, 671 F.2d at 333-34 (Ninth Circuit holding that discriminatory intent need not be shown in cases challenging "facially discriminatory practices"). The Sixth Circuit's reliance on *Furnco* and *Burdine* is misplaced for the reasons explained in the *amicus* brief filed by the AAUP and other organizations in *Peters*. *See* Appendix, *supra* note 3, at 8a.

of female retirees as a class and male retirees as a class. "[W]omen live longer than men," the court observed. "Women receive smaller annuities over a longer period of time to ensure that the *value of the retirement plan for women and men* is equal." [34] In contrast, the Second Circuit avoided generalizations about classes of annuitants:

> Defendants attempt to argue that the TIAA-CREF plans are fair to both men and women because each individual participant receives a benefit package that is of actuarially equal value. This argument is unconvincing because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarially equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups.[35]

The "clear mandate" referred to by the Second Circuit comes from *Manhart* and the language of Title VII itself. Congress, as a matter of national policy, has declared that employees cannot be classified by race or sex, even when the classification can be justified actuarially or results in equal treatment of *classes* of employees. The court below properly looked at the effect of sex-segregated mortality tables on individual female employees, and, applying *Manhart*, held that the use of these tables violated Title VII. The court in *Peters* literally ignored the central holding in *Manhart* and relied on the same notions of actuarial equity that *Manhart* condemned. This is, undeniably, a conflict; but the issue is so clearly controlled by *Manhart* that the Court can resolve the conflict without granting plenary consideration in either case.

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[34] Pet. App. 141a (emphasis added).

[35] Pet. App. 12a.

B. *TIAA-CREF's Exposure Under Title VII.* The Second and Sixth Circuits also disagreed over the propriety of treating TIAA and CREF as "employers" within the meaning of that term in Title VII. The Sixth Circuit in *Peters*, observing that TIAA-CREF "does not 'employ' the plaintiffs in the conventional sense of the word," held that TIAA-CREF did not come within the reach of Title VII "simply by furnishing its services to a Title VII employer." [36] The Second Circuit acknowledged that the plaintiff "[was] not an employee of TIAA-CREF in any commonly understood sense," but went on to explain that the term "employer" as used in Title VII is construed in a functional sense to encompass persons who are not conventional employers but who nevertheless control some aspect of an employee's compensation or terms of employment.[37]

The petitioners adopt the Sixth Circuit's construction of the statute and argue that they are immune from liability under Title VII because they are independent insurers, not employers.[38] This claim ignores the extraordinarily close relationship between the institutional employers and the allied organizations (TIAA and CREF). TIAA and CREF were founded and today exist solely for the purpose of providing pensions and financial services to the employees of the nation's educational institutions. College administrators participated in the decision to create TIAA and CREF and supervised the design and implementation of the TIAA-CREF program. Educational institutions share with TIAA and CREF the responsibility for managing an important aspect of the employment relationship. This is plainly sufficient, under well-established judicial interpretations of Title VII, to subject TIAA and CREF to the Act's prohibition of discrimination.

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[36] Pet. App. 139a.

[37] *Id.* 14a. *See also id.* 60a-62a.

[38] Pet. 16-17.

Title VII extends well beyond the conventional employer-employee relationship. It reaches "agents" of an employer, employment agencies, and labor organizations, none of which "employs" potential Title VII complainants in the ordinary sense of that term.[39] Rather than prohibiting discrimination against "employees," the statute prohibits discrimination against "any *individual*" on account of "such *individual*'s" race or sex[40]—"a strong indication," in the words of one appellate court, "that the proscriptions contemplated by Section 703(a)(1) reach beyond the immediate employment relationship."[41]

Title VII is a remedial statute designed to eradicate discrimination in employment.[42] Like other remedial statutes, it has been construed liberally in order to achieve the congressional purpose for which it was enacted. The lower courts have consistently construed the statutory term "employer" to include entities that control any aspect of compensation, not just salary.[43] The restrictive definition of "employer" urged by TIAA and CREF would enable companies or institutions bent on treating one class of employees preferentially to immunize themselves from Title VII liability by delegating authority over the appropriate aspect of the employment rela-

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[39] Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C. §§ 2000e, 2000e-2(b), (c) (1976 & Supp. IV 1980). *See* Sibley Mem. Hospital v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

[40] Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added).

[41] *Sibley Mem. Hospital, supra*, 488 F.2d at 1341.

[42] Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971); Silver v. Mohasco Corp., 602 F.2d 1083, 1087 (2d Cir. 1979); Craig v. Dep't of Health, Education & Welfare, 581 F.2d 189, 193 (8th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977).

[43] *See* Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391 (8th Cir. 1977); EEOC v. Wooster Brush Co., 523 F. Supp. 1256, 1261, 1263 (N.D. Ohio 1981); Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670, 696 (D. Md. 1979); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089, 1091-92 (D.N.H. 1974).

tionship to third parties. *Manhart* implicitly rejected that outcome,[44] as have other courts before and since.[45]

III. The petitioners' assertion that the courts below "disregarded *Manhart*'s admonition against the imposition of retroactive relief"[46] is incorrect for several reasons.

First and most importantly, the injunction ordered by the trial court and affirmed by the Second Circuit was on its face prospective only. As the petition indicates, the trial court decree, entered in mid-1979, required the defendants to cease using sex-differentiated mortality tables by May 1, 1980—nearly nine months later.[47]

Second, as the petition also acknowledges,[48] the accumulations credited to similarly situated men and women are "equal . . . at retirement." TIAA and CREF do not use sex-differentiated tables until a participant retires. At that point, the participant's annuity contract is "settled,"[49] and periodic benefits are derived from two tables, one for male retirees and one for female retirees. The relief ordered by the courts below applies only to retirees who, like plaintiff Diana Spirt, retire on or after May 1, 1980. The injunction does not affect the benefits of those who had already retired by that date.

Third, the remedial decree ordered by the District Court does not contravene *Manhart* in any respect. Here,

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[44] "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." *Manhart*, *supra*, 435 U.S. at 718 n.33.

[45] *See, e.g.*, Baker v. Stuart Broadcasting Co., *supra*, 560 F.2d at 391-92; Sibley Mem. Hospital v. Wilson, *supra*, 488 F.2d at 1341; EEOC v. Wooster Brush Co., *supra*, 523 F. Supp. at 1261-63.

[46] Pet. 17.

[47] *Id.* 6.

[48] *Id.* 4.

[49] Pet. App. 5a.

as there, the court did not order back pay in the form of supplemental benefits for those already retired. Here, as there, the trial court carefully avoided requiring the petitioners "to meet unchanged obligations with diminished assets." [50] Instead, the very cross-subsidization of risks approved in *Manhart* will provide the source of the relief.[51]

Finally, the equitable concerns that gave the Court pause in *Manhart* are substantially lessened today. In contrast to *Manhart*, this is not the "first litigation" challenging the use of "valid actuarial tables." [52] In view of the unanimity of the lower courts on these issues when the Second Circuit rendered its decision, the relief ordered here was hardly "a marked departure from past practice." [53] More than four years after *Manhart* and eight years after Diana Spirt commenced this action, the petitioners' claims of surprise and novelty are less than persuasive.

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[50] *Manhart, supra*, 435 U.S. at 723.

[51] *Id.* at 710. Male annuitants will not suffer the grave consequences described by TIAA and CREF in the lower courts and in this Court. Most men elect joint-survivorship annuities under which benefits are already calculated using the functional equivalent of unisex tables. J.A. 550, 592. These men, in fact, actually may gain from a switch to unisex tables. J.A. 590. As for those with single-life policies, data contained in the records here and in *Peters* show that TIAA-CREF could painlessly bring future female retirees up to the periodic benefit levels now enjoyed by their male counterparts by reallocating a miniscule fraction—something less than two percent—of the three quarters of a billion dollars of discretionary dividend income earned by TIAA-CREF each year. J.A. 588-93. This is due in part to the fact that contributions from male participants are three times as great as those from females. *See* Appendix 12a. Put more simply, TIAA-CREF has more than enough discretionary income to increase female payout rates without reducing guaranteed benefits for male retirees.

[52] 435 U.S. at 722.

[53] *Id.*

CONCLUSION

For the foregoing reasons, the AAUP believes that the decision below is correct and in full accord with the controlling decision in *Manhart*. Although the decision below conflicts with the Sixth Circuit's subsequent decision in *Peters*, we have previously suggested that *Peters* is irreconcilable with *Manhart* and that summary reversal of the judgment in *Peters* is accordingly appropriate. If the Court should adopt that course, the instant petition should be denied.

Should the Court, however, grant plenary review in *Peters*, then the instant case also should be heard. The factual background and legal contentions of the parties are virtually identical in the two cases, and the decisions are in direct conflict.

Respectfully submitted,

LAWRENCE WHITE
(Counsel of Record)
DAVID M. RABBAN
ANN H. FRANKE
1 Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050
JOHN L. POTTENGER, JR.
Yale Law School
Box 401-A
Yale Station
New Haven, CT 06520
Counsel for the American Association of University Professors

Of Counsel:
RALPH S. SPRITZER
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19174

December 8, 1982

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-794

MILDRED PETERS *et al.*,
Petitioners,

v.

WAYNE STATE UNIVERSITY,
TEACHERS INSURANCE AND ANNUITY ASSOCIATION,
and COLLEGE RETIREMENT EQUITIES FUND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

This brief is filed, with the consent of all petitioners and respondents, on behalf of the American Association of University Professors ("AAUP"), the American Federation of Teachers ("AFT"), and the National Education Association ("NEA"), *amici curiae*, in support of the petition for certiorari filed November 10, 1982.

As explained more fully below, the *amici* contend that this case is clearly controlled by the Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). Since the decision of the court of appeals is irreconcilable with *Manhart*, we suggest that it would be appropriate to grant the petition and to reverse summarily the judgment below.

INTEREST OF THE *AMICI*

The *amici curiae* are three of the nation's largest organizations of teaching professionals. Many of their members, like the petitioners in this case, participate in university pension plans managed by respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF"), two closely allied non-profit corporations created to manage a national pension system for the employees of the country's institutions of higher education.

The AAUP is a membership association of 70,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the oldest and largest association of its kind in the country. Approximately eighty percent of its members are male. The AAUP has chapters on 1,300 campuses, and eighty of those chapters engage in collective bargaining on behalf of faculty members. Since 1972, the Wayne State University Chapter of the AAUP has been the certified collective bargaining representative for faculty members at that institution.

The AAUP has long been committed to the elimination of sex discrimination in the higher education community. Even before this Court's decision in *Manhart*, the AAUP formally sought to eradicate widespread discrimination against women in the funding and management of institutional pension plans. Since 1974, the AAUP has repeatedly urged TIAA-CREF, the principal annuity association to which AAUP members belong, to

stop the practice of using sex-based actuarial tables to derive substantially lower retirement benefits for women than for men with equivalent income histories.[1] TIAA-CREF's refusal to adopt a single actuarial table for annuitants of both sexes has generated litigation between TIAA-CREF and the AAUP raising many of the same issues described in the petition in this case.[2]

The American Federation of Teachers (AFL-CIO) is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Nearly 80,000 of its 560,000 members are employed in higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 institutions across the country. Operating on the national level, as well as through its affiliated locals, the AFT is committed to the establishment and preservation of sex-neutral policies in all aspects of the employment relationships of its members.

The National Education Association is the largest organization of education employees in the United States, with a current membership of approximately 1.7 million persons. A significant number of NEA members are employed in institutions of higher education, and most of these members participate in TIAA-CREF retirement plans. One of the NEA's purposes is to safeguard the constitutional and statutory rights of its members, in-

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[1] The AAUP's own employees participate in a voluntary retirement plan managed by TIAA-CREF. Because TIAA-CREF refuses to equalize retirement benefits for males and females, the AAUP makes annual direct payments to female retirees sufficient to raise their benefits to the levels enjoyed by male retirees with comparable employment histories.

[2] The AAUP was an appellee in Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. September 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791). The AAUP, with the American Civil Liberties Union, also participated as *amicus curiae* in *Manhart* when the Court decided that case during the 1977 Term.

cluding the right of its female members to be free from sex-based discrimination in pension and annuity plans.

The *amici curiae* are well situated to speak for TIAA-CREF policy-holders with a direct stake in the outcome of this case. The views of the men and women who contribute to the TIAA-CREF pension pool and who will one day receive TIAA-CREF pension benefits may be helpful to the Court in considering and eventually resolving the issues raised in the petition.

REASONS FOR GRANTING THE WRIT

The petitions in this case and *TIAA-CREF v. Spirt*[3] bring to four the number of cases pending before the Court in which retirement plans that pay a different and smaller periodic benefit to female employees than to their male counterparts are challenged under Title VII of the Civil Rights of 1964.[4] Petitions were filed earlier this year in *California v. Retired Public Employees' Association of California*[5] and *Arizona Governing Committee v. Norris.*[6] On October 12, the petition in the latter case was granted.[7]

These four cases are the first pension discrimination cases to reach this Court since *Manhart* was decided. In that case the Court held that Title VII was violated by the establishment of an employer-operated pension plan in which retired employees of both sexes received equivalent periodic retirement benefits although female participants were required to make significantly greater periodic contributions during their worklives:

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[3] *See* note 2, *supra.*

[4] 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[5] 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262).

[6] 51 U.S.L.W. 3187 (U.S. July 14, 1982) (No. 82-52).

[7] 51 U.S.L.W. 3276 (Oct. 12, 1982).

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.
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> • • •
>
> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. . . . Even if the statutory language were less clear, *the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.*[8]

In the years since *Manhart* was decided, TIAA-CREF has continued to use sex-differentiated actuarial tables and, when challenged, has attempted to draw a distinction between the retirement plan at issue in *Manhart*, which required female employees to make larger periodic contributions in order to receive the same periodic benefits as their male counterparts, and its own retirement plan, which exacts the same periodic contribution from males and females but pays females a significantly smaller monthly benefit after retirement. Until last month's decision by the court below, however, every post-*Manhart* decision rejected that distinction.[9] The Second Circuit's recent decision in *Spirt*, another case involving TIAA-CREF retirement benefits, is typical:

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[8] 435 U.S. at 708, 709 (emphasis added). *See* Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976) (making it unlawful for an employer to "classify" employees on the basis of sex).

[9] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. Sept. 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791); Retired

> [W]e can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment accorded the female TIAA-CREF participants in this case. . . . In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII.[10]

The Sixth Circuit's attempt to resurrect the same distinction conflicts with the reasoning of this Court in *Manhart*. The court below ignored the admonition in *Manhart* to "focus on fairness to individuals rather than fairness to classes," 435 U.S. at 709, and instead equated the aggregate "value of the retirement plan" for women as a class and men as a class.[11] According to the court below, "accepted actuarial practices" offer a "legitimate non-discriminatory reason for treating female and male

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Public Employees' Ass'n of California v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds).

[10] Spirt v. TIAA-CREF, *supra* note 2, slip op. at 11-12.

[11] Peters v. Wayne State University, Nos. 79-1658, 79-1670 & 79-1671, slip op. at 6 (6th Cir. Oct. 14, 1982), reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at A-8.

annuitants differently" [12]; the court does not mention, however, that the same actuarial justification for distinguishing between classes of annuitants was considered and rejected in *Manhart*.[13]

The court also erred by holding that male and female employees at Wayne State University "receive equal compensation" under the pension plan now in effect.[14] *Manhart* expressly recognized that pension benefits are "compensation" embraced by Title VII.[15]

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[12] *Id.*

[13] 435 U.S. at 708-709.

As at least four lower courts have noted, notions of actuarial "fairness" may produce a result that is far from equitable for the vast majority of working women. Although women as a class have a longer life expectancy than men as a class, the difference is attributable to a small fraction of the female population who live especially long and a small fraction of the male population who die especially young. Eighty-four percent of all women and 84 percent of all men have the same life expectancy. For most women, therefore, a smaller monthly pension will generate less money over the course of a lifetime than most men will earn. "As a result, each woman is penalized because a few women live longer and each man benefits because a few men die early." Henderson v. Oregon, 405 F. Supp. 1271, 1275 n. 5 (D. Ore. 1975). *Accord*, Norris v. Arizona Governing Committee, *supra* note 9, 671 F.2d at 332 n. 1; Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 585 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, 176, *cert. denied*, 434 U.S. 825 (1977).

In sum: If notions of actuarial fairness were germane under Title VII, it is far from clear that equity would compel the use of sex-differentiated actuarial tables. But under *Manhart*, such notions are not germane. The actuarial characteristics of women as a class cannot be invoked as a justification for sex discrimination. "Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708.

[14] *Peters, supra* note 11, slip op. at 8, Pet. App. A-10.

[15] 435 U.S. at 712 n. 23. If pension benefits for males and females are unequal, then so is "compensation", even if take-home pay is the same.

There is a more fundamental flaw in the Sixth Circuit's decision. The court erroneously relied on *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corp. v. Waters*, 433 U.S. 567 (1978), for the proposition that Title VII complainants must "demonstrate at trial that [the employer's] motivation was discriminatory or improper. . . ." [16] These cases, however, are quite beside the mark. They are meant to apply when an employee claims that he or she was fired (or not promoted) because of sex or race, and the employer denies that that was the reason for the adverse action. When there is a dispute over the employer's true motivation in singling out an individual employee for special treatment, *Burdine* and *Furnco* provide a useful evidentiary mechanism for allocating the burden of proof. In pension discrimination cases, however, motivation is not a disputed issue. The TIAA-CREF pension plan, to borrow a phrase used repeatedly in *Manhart*, is "discriminatory on its face." [17] It singles out all women for special treatment because they are women. The question before the court below was whether Title VII permits periodic pension benefits to be computed using a classification scheme based on sex. *Burdine* and *Furnco* do not provide the answer. *Manhart* does.[18]

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[16] Peters, *supra* note 11, slip op. at 7, Pet. App. A-9.

[17] 435 U.S. at 715, 716. TIAA-CREF defends this discrimination by invoking concepts of actuarial equity. But this is irreconcilable with *Manhart's* emphasis on equal treatment for individuals rather than groups. *See* nn. 11-13, *supra*, and accompanying text. *See also* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI.L.REV. 505, 508-23 (1980).

[18] The holdings in *Burdine* and *Furnco* follow from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), decided five years before *Manhart*. Under the analysis first prescribed in *McDonnell Douglas*, proof in support of a disputed claim of disparate treatment is presented to the trial court in three sequential stages. 411 U.S. at 802-804. If, as the lower court apparently believed, the three-

In sum, the decision below is irreconcilable with this Court's decision in *Manhart* and inconsistent with an unbroken line of lower court cases that rely on *Manhart*. In the circumstances, we believe that it would be appropriate to grant the petition and to reverse summarily the judgment below.

The Court's decision to grant certiorari in the *Norris* case [19] underlines the appropriateness of summary reversal here. *Norris* raises issues that are considerably narrower than those in *Manhart* and the other post-*Manhart* cases (including this one). As the petition in *Norris* candidly acknowledges, the facts in that case are "[u]nlike previous cases where the insurance company had a possibly symbiotic relationship with the employer, or the employer took an active role in administering the allegedly discriminatory [pension plan] . . . ." [20] The employer in *Norris* neither contributes to nor supervises the administration of a retirement benefit plan. Here, by contrast, the pension plan provided by Wayne State University and TIAA-CREF is funded through employer and employee contributions and provides annuity benefits only.

The petitioners in *Norris* have gone to considerable lengths to stress the controlling nature of the *Manhart* decision, stating that the statutory question is whether, "under the reasoning of [*Manhart*]," Title VII was violated by a voluntary deferred compensation plan that allowed employees of both sexes to purchase retirement

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step analysis was meant to be applied in pension discrimination cases, one would expect to find references to *McDonnell Douglas* and *Furnco* in *Manhart*. There are, of course, no such references. So far as we have been able to determine, the decision of the court below marks the first time any federal court has sought to apply the three-step analysis of *McDonnell Douglas* in a pension discrimination case.

[19] *See* notes 6 & 7, *supra*.

[20] *Petition* in No. 82-52, at 8.

benefits on the open market.[21] *Norris* is presented to the Court as an exception to the rule in *Manhart*, not as a challenge to that rule. If *Norris* is decided on the basis of the questions presented by the petitioners—the tenuous relationship between the employer and the insurer and the "open market option" available to participants under that plan—then the decision in *Norris* will not be controlling here.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted and the judgment of the court below should be summarily reversed.

Respectfully submitted,

LAWRENCE WHITE
(Counsel of Record)
ANN H. FRANKE
1 Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel for the
American Association of
University Professors

WOODLEY B. OSBORNE
FRIEDMAN & WIRTZ
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-0736
Counsel for the
American Federation of Teachers

JOY L. KOLETSKY
1201 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 822-7035
Counsel for the
National Education Association

Of Counsel:
RALPH S. SPRITZER
University of Pennsylvania
Law School
3400 Chestnut St.
Philadelphia, Pa. 19174

JOHN L. POTTENGER, JR.
Yale Law School
New Haven, Ct. 06520

November 12, 1982

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[21] *Id.* at i.

TEACHERS INSURANCE AND
ANNUITY ASSOCIATION OF AMERICA
COLLEGE RETIREMENT EQUITIES FUND

[EMBLEM]

730 Third Avenue, New York, N.Y. 10017

(212) 490-9000

January 11, 1980

Mr. James Gardiner
Supervising Actuary Life Bureau
New York State Insurance Department
Two World Trade Center
New York, New York 10047

Dear Jim:

I appreciated the opportunity to talk to you yesterday about TIAA's annuity contract filing with premium rates that utilize a merged gender mortality table. As you know, these contracts will be used for funding pension benefits at institutions of higher education. In response to your request, I am enclosing:

i) a copy of the merged gender mortality table and rates for TIAA deferred annuity guarantees and for CREF.

ii) a description of the derivation of the merged gender mortality table.

iii) the TIAA deferred annuity contract and the CREF deferred annuity certificate that we are currently issuing.

iv) the distribution by sex, age and income option election of the 1978 TIAA accumulations converted to pay-out annuities.

I am also sending some information we developed to assure ourselves that the adoption of these merged gender mortality tables will be actuarially sound. These enclosed tables show the results of tests to analyze the financial

impact of the merged gender rates on TIAA deferred annuity guaranteed rates under certain "worst case" scenarios of highly unlikely anti-selection.

Table I shows the current TIAA option election percentages for males and females at time of retirement and hypothetical election percentages in our worst case scenario. Table II compares the accumulation being settled with the cost (present value) of the unisexed benefit payments, assuming that they are made a) under our current income option elections and b) under the worst case option elections. The present values were computed using separate male and female mortality tables. The comparison based on our current income option election percentages confirms the actuarial soundness of the proposed merged gender mortality table for use currently. Even this worst case income option election scenario would increase the cost of benefits under the merged-gender table by only about 1.25%. This increase in cost could be covered by about ⅔ of a year's set back to the mortality table, or by about a ¼% decrease in the pay-out annuity interest rate.

About 25% of total TIAA premiums is currently received for female participants and 75% for male participants. We estimated the increase in cost that would occur if, overnight, this percentage shifted so that 50% of our total TIAA deferred annuity premiums were remitted for female participants. Even a shift as dramatic as this would increase the cost or present value of these unisexed benefits by only about 2%; a cost that could be covered by a one year set back to the mortality table or by a reduction of about ¼% decrease in the pay-out annuity interest rate. But since a shift of this nature could occur only over time, we would be aware of it as it occurred and would adjust our deferred annuity guarantees accordingly.

We also examined the potential for institutions opting out of the TIAA-CREF pension system because their per-

centage of males is higher than the overall TIAA percentage of males. Table III shows TIAA premium income split into percentage categories based on the percentage of premiums being remitted for males at each institution. This table shows that 82% of the total TIAA premium is being remitted by institutions that have close to the TIAA average (75% male) or a higher female average.

Table IV shows all institutions with $1,000,000 or more of TIAA yearly premium that are remitting 90% or more of this premium for males. Based upon TIAA dividend rates, institutions that remit 100% of their total premiums for males would have a potential, but by no means certain, savings or increase in benefits for employees of about 1.25% of their premiums if they were to opt out of TIAA individual annuity system for a group annuity that computed unisex rates on their own experience. For an institution that remits 90% of its total premiums for males, this savings would reduce to .75% or $7,500 for each $1,000,000 of premiums. We do not expect even these few institutions to forfeit the advantages of the TIAA and CREF individual contract pension system because of such a small and uncertain potential savings. In addition, over time, it is more likely that institutions will move closer to the overall TIAA male and female average than in the other direction.

Once again, thanks for your attention to this filing and please call if I can answer any questions or be helpful to you in any way on this very important matter.

Very truly yours,

/s/ Tom
THOMAS G. WALSH
Vice President and Actuary

TGW:PG
Enclosures

MEN

Monthly Income from
$10,000 Accumulation at Age 65

Income Option	% How Electing	TIAA		CREF	
		Now	Merged	Now	Merged
Single Life	12%	$102	$98	$70	$64
Single Life, 10 Certain	15	97	93	65	61
Single Life, 20 Certain	7	87	86	56	54
Joint and Full Survivor	30	86	86	53	53
Joint and 2/3 Survivor	28	93	93	60	60
Half to Spouse	3	93	91	60	58

Basis: CREF: 4% 71 IAM (0, 1½)
TIAA: 9½% 71 IAM, (1, 2½)

Age: 65, 65

TIAA IMMEDIATE ANNUITY CONTRACTS ISSUED DURING 1978

ANALYSIS OF INCOME OPTIONS SELECTED

Option (Life)	Male				Female			
	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total
Single Life Annuities								
without a guaranteed period	685	14.7%	$ 824,108	12.3%	1,188	36.6%	$ 926,560	40.9%
with a 10 year guaranteed period	748	16.0	835,984	12.4	788	24.3	566,692	25.0
with a 15 year guaranteed period	7	.1	2,919	.0	5	.1	1,841	.1
with a 20 year guaranteed period	498	10.7	414,254	6.2	543	16.7	298,480	13.2
Installment Refund Option	108	2.3	,078	2.6	114	3.5	92,306	4.1
TOTAL	2,046	43.8%	$2,254,943	33.5%	2,638	81.2%	$1,885,879	83.3%
Last Survivor Full Annuities								
without a guaranteed period	82	1.8%	$ 103,768	1.6%	11	.3%	$ 11,118	.5%

Option (Life)	Male				Female			
	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Amount of Annual Income	Percent of Total
with a 10 year guaranteed period	481	10.3	906,091	13.5	131	4.0	91,313	4.0
with a 15 year guaranteed period	11	.2	9,205	.1	0	.0	0	.0
with a 20 year guaranteed period	941	20.1	1,166,197	17.3	298	9.2	144,315	6.0
TOTAL	1,515	32.4	$2,185,261	32.5%	440	13.5%	$ 246,746	10.9%
Last Survivor Half Annuities								
without a guaranteed period	22	.5%	$ 43,549	.6%	1	.0%	$ 2,891	.1%
with a 10 year guaranteed period	104	2.2	208,201	3.1	21	.7	25,380	1.1
with a 15 year guaranteed period	3	.1	3,278	.1	0	.0	0	.0
with a 20 year guaranteed period	155	3.3	272,453	4.1	26	.8	16,707	.8
TOTAL	284	6.1%	$ 527,481	7.9%	48	1.5%	$ 44,978	2.0%

Joint & 2/3 Survivor without a guaranteed period	35	.8%	$ 89,650	1.3%	3	.1%	$ 3,121	.1%
with a 10 year guaranteed period	352	7.5	879,097	13.1	51	1.6	37,355	1.7
with a 15 year guaranteed period	9	.2	7,599	.1	0	.0	0	.0
with a 20 year guaranteed period	432	9.2	781,334	11.6	68	2.1	45,774	2.0
TOTAL	828	17.7%	$1,757,680	26.1%	122	3.8%	$ 86,255	2.0
TOTAL INVOLVING LIFE CONTINGENCIES	4,673	100.0%	$6,725,365	100.0	3,248	100.0%	$2,263,858	100.0%
Option (Non-Life)								
Annuity Certain	124	59.6%	$ 199,448	84.6%				
Principal and Interest	84	40.4	36,193	15.4				
TOTAL NOT INVOLVING LIFE CONTINGENCIES	208	100.0%	235,641	100.0%				

TIAA IMMEDIATE ANNUITY CONTRACTS ISSUED DURING 1978

ANALYSIS OF ANNUITY STARTING AGE

Age	MALE				FEMALE			
	Number of Annuitants	Percent of Total	Annual Income	Percent of Total	Number of Annuitants	Percent of Total	Annual Income	Percent of Total
Under 51	378	8.1%	$ 148,523	2.2%	171	5.3%	$ 48,358	2.1%
51	10	.2	7,199	.1	19	.6	8,194	.4
52	14	.3	5,904	.1	13	.4	5,360	.2
53	22	.5	14,749	.2	16	.5	6,820	.3
54	15	.3	32,786	.5	10	.3	4,641	.2
55	51	1.1	42,934	.6	39	1.2	18,738	.8
56	50	1.1	48,302	.7	36	1.1	20,671	.9
57	51	1.1	68,059	1.0	34	1.0	22,782	1.0
58	46	1.0	45,676	.7	43	1.3	25,730	1.1
59	48	1.0	46,080	.7	47	1.4	21,053	.9
60	108	2.3	117,217	1.7	107	3.3	56,110	2.5
61	87	1.9	117,888	1.8	78	2.4	46,510	2.1
62	288	6.2	311,864	4.6	242	7.5	167,646	7.4
63	210	4.5	247,165	3.7	229	7.0	155,184	6.9
64	191	4.1	252,894	3.8	174	5.4	107,237	4.8

65	1,319	28.2	1,623,953	24.2	1,022	31.5	716,969	31.7
66	715	15.3	1,186,314	17.6	451	13.9	332,717	14.7
67	254	5.4	475,016	7.1	119	3.7	113,655	5.0
68	191	4.1	501,489	7.5	119	3.7	111,641	4.9
69	147	3.1	338,543	5.0	72	2.2	87,123	3.9
70	226	4.8	531,479	7.9	86	2.6	77,665	3.4
71	163	3.5	404,861	6.0	75	2.3	74,965	3.3
75	64	1.4	110,116	1.6	35	1.1	26,719	1.2
80	25	.5	46,354	.7	11	.3	7,370	.3
80	—	—	—	—	—	—	—	—
TOTAL	4,673	100.0%	$6,725,365	100.0%	3,248	100.0%	$2,263,858	100.0%

MERGED MORTALITY TABLE ASSUMPTIONS

	Per Cent Now Electing		Worst Case Elections	
Income Option	Male	Female	Male	Female
Single Life	12%	41%	—0—	100%
Single Life, 10 Certain	15	26	—0—	—0—
Single Life, 20 Certain	7	15	34	—0—
Joint and Full Survivor	30	11	40	—0—
Joint and 2/3 Survivor	28	5	26	—0—
Half to Spouse	8	2	—0—	—0—

COMPARISON OF PRESENT VALUE (COST) OF MERGED MORTALITY TABLE INCOME PAYMENTS WITH THE ACCUMULATION NOW BEING SETTLED

Rate Basis	Accumulation Being Settled	1971 IAM MGM 1 Current Option Elections	Comparison
TIAA Guarantees	$149,425,000	$150,105,000	100.46%
TIAA Dividend	149,425,000	149,465,000	100.03
CREF	73,620,000	73,640,000	100.03

	Accumulation Being Settled	1971 IAM MGM 1 Worst Case Option Elections	Comparison
TIAA Guarantees	$149,425,000	$152,035,000	101.75%
TIAA Dividend	149,425,000	151,295,000	101.25
CREF	73,620,000	74,845,000	101.66

TIAA Premium Income by Sex and Institutions

Percent Male	No. of Institutions	Premium	Percentage of Total TIAA Premium
90-100%	1,148	$ 34,581,000	6%
85-89%	243	62,747,000	12
65-84%	1,311	335,085,000	61
55-64%	451	63,687,000	12
0-54%	1,161	47,728,000	9
Total	4,314	$543,828,000	100%

All Institutions with TIAA Premium Volume of $1,000,000 or More and a Male Content of 90% or More

Institution	TIAA Premium	Percent Male
Jet Propulsion Lab	$ 2,715,000	99%
Draper Lab	1,090,000	96
Southwest Research Inst	1,070,000	96
Argonne National Lab	4,980,000	92
University of Virginia	2,175,000	91
Harvard University	4,440,000	90
Utah State University	1,370,000	90
University of Colorado (Boulder)	1,300,000	90
University of Notre Dame	1,000,000	90
9	$20,140,000	92%

Supreme Court, U.S.
FILED
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Nos. 82-791 and 82-913

In the Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

DIANA L. SPIRT, ET AL.

LONG ISLAND UNIVERSITY, PETITIONER

v.

DIANA L. SPIRT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS RESPONDENT, AND FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL N. MARTINEZ
Deputy General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the use of sex-based actuarial tables to provide unequal pension benefits to male and female retirees violates Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1).

2. Whether Teachers Insurance and Annuity Association and College Retirement Equities Fund are "employers" within the meaning of Title VII.

3. If TIAA and CREF are employers, whether the McCarran-Ferguson Act precludes the application of Title VII to the retirement plan offered here.

4. Whether the relief mandated by the courts below is appropriate.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-791

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS RESPONDENT, AND FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 691 F.2d 1054. The district

court's opinion of July 1, 1976 (Pet. App. 32a-43a) is reported at 416 F. Supp. 1019; its opinions of August 9 and September 12, 1979 (Pet. App. 44a-81a) are reported at 475 F. Supp. 1298; its opinion of March 19, 1982 (Pet. App. 82a-131a) is reported at 93 F.R.D. 627; and its opinion of January 23, 1976 (Pet. App. 28a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1982 (Pet. App. 132a). The petition for a writ of certiorari in No. 82-791 was filed on November 9, 1982, and in No. 82-913 on November 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees * * * and any agent of such a person * * *.

Section 703(a)(1) of Title VII of that Act, 42 U.S.C. 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *.

Section 204(g) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), provides that:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

Section 411(d)(6) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)) provides that:

> A plan shall be treated as not satisfying the requirement of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

STATEMENT

1. Respondent Diana L. Spirt, a tenured professor at Long Island University (LIU), a private educational institution, brought this action alleging that the use by Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF) of sex-segregated mortality tables which result in the payment to women of lower monthly retirement benefits than are paid to similarly situated men, violated Title VII of the Civil Rights Act of

1964, as amended (42 U.S.C. 2000e *et seq.*).[1] The Equal Employment Opportunity Commission (EEOC) intervened in this case on March 19, 1982 (Pet. App. 96a).

TIAA and CREF are non-profit organizations incorporated in the State of New York that provide retirement and insurance plans for the employees of educational institutions, including Long Island University (Pet. App. 3a, 45a). Participation in TIAA and CREF plans is limited to colleges, universities, independent schools and other nonprofit educational or research institutions (Pet. App. 45a). TIAA, which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching, offers what are in form fixed annuities for retirement plan participants. Its companion corporation, CREF, was established in 1952 to permit investment in common stock; CREF offers plan participants variable annuities (Pet. App. 3a-5a). By 1977, more than 85% of all private, four-year colleges and universities and more than 40% of all public colleges and universities had adopted retirement plans managed by TIAA-CREF (Pet. App. 3a). At that time, more than 400,000 employees of approximately 2,800 participating institutions were covered by the TIAA-CREF system (Pet. App. 3a).

Educational institution participation in the TIAA-CREF system is "normally established by a resolu-

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[1] The complaint also alleged that TIAA-CREF's use of sex-segregated tables violated the equal pay provision of the Fair Labor Standards Act, as amended in 1963, 29 U.S.C. 206(d), and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 33a). However, only Title VII issues are presented in this Court.

tion of the board of trustees" (J.A. 173).[2] In 1975, the trustees of Long Island University passed a resolution adopting the TIAA and CREF plan at issue here and establishing the conditions under which university employees would participate in the plan (J.A. 188-191). In addition, the resolution provides that, subject to the understanding that accrued benefits will not be affected, the "Board of Trustees of the University [re]serves the right to modify or discontinue the plan at any time" (J.A. 192).

Under that resolution, tenured faculty members such as respondent Spirt must participate in the LIU plan (Pet. App. 3a). The resolution also provided that each employee would contribute 5% of his salary to the plan and that the University would contribute an additional sum in the amount of 5% of the first $4,800 of an employee's yearly salary and 11% of yearly earnings in excess of $4,800 (Pet. App. 4a).

The university forwards all contributions, including those paid by participating employees, to TIAA and CREF (Pet. App. 4a). Each contribution made by or on behalf of an employee is credited to an individual account; each participating employee holds an individual contract with TIAA-CREF (J.A. 174-175). Although TIAA and CREF operate differently, both use mortality tables classified by sex in calculating plan benefits, because women as a class live longer than men as a class (Pet. App. 5a).[3] Be-

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[2] "J.A." refers to the joint appendix filed with the court of appeals.

[3] TIAA provides a fixed minimum annuity that is determined by applying a guaranteed interest rate to the contributions set aside in an "accumulation" for each participant, then converting this accumulation plus added "dividends" to a life annuity on the basis of this amount. Each contribution

cause benefits are calculated on the basis of sex-segregated tables, "female participants in the plans receive smaller monthly [retirement] payments than male participants of the same age, years in the plans, salary, and rate of contribution" (Pet. App. 46a).

2. After denying a motion for class certification, the district court granted summary judgment in favor of respondent Spirt. Applying this Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the district court held that Long Island University and CREF had violated Title VII by using sex-segregated mortality tables that resulted in payment of lower monthly retirement benefits to women than to similarly situated men (Pet. App. 58a-60a).[4] The court found that Long Island University and other educational institutions have "delegated their responsibility for and control over employee annuity plans to TIAA

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also provides entitlement to a specified sum as part of a minimum guaranteed annuity benefit. That sum is determined on the basis of sex-segregated rate schedules incorporated in the contract. TIAA reserves the right to substitute a different rate schedule, which may only apply to premiums collected after its adoption (Pet. App. 76a n.28; J.A. 174, 194, 197).

The CREF portion of the plan provides for a variable annuity (Pet. App. 5a). During a participant's career, CREF contributions are applied to the purchase of "accumulation units" representing an interest in CREF's investment portfolio. At retirement, accumulation units are converted into "annuity units," which are computed on the basis of sex-segregated mortality tables. The actual benefits received by retired participants vary with the market value of the CREF portfolio (Pet. App. 74a-75a).

[4] Finding no state action, the district court ruled against respondent Spirt on her constitutional claims. It did not reach her Equal Pay Act allegations (Pet. App. 3a).

and CREF" and, hence, TIAA and CREF are employers within the meaning of Title VII (Pet. App. 61a-62a). The court also held (Pet. App. 46a-53a) that TIAA (but not CREF) was in the "business of insurance" and, hence, insulated from Title VII liability by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, which provides that "[n]o Act of Congress shall be construed to invalidate * * * any law enacted by any State for the purpose of regulating the business of insurance" (*id.* at 1012(b)) unless the federal act specifically so states. Because CREF was not insulated from Title VII liability, in September 1979 the court enjoined CREF from using sex-segregated mortality tables in calculating annuity benefits for persons who retire on and after May 1, 1980 (Pet. App. 134a-135a). The court also enjoined Long Island University from contributing to, or requiring its employees to contribute to, on and after July 1, 1980, any retirement program that uses sex-segregated mortality tables in calculating periodic benefits for persons who retire after that date (*ibid*).[5]

After the district court entered its judgment, all parties filed notices of appeal; the appeals were withdrawn from active consideration while settlement negotiations were conducted (Pet. App. 8a, 84a-85a). In the course of those negotiations, petitioners proposed several rate schedules that did not differentiate

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[5] By a series of stipulated orders, the defendants' compliance with the injunctive provisions of the district court's orders and judgment has been stayed pending appeals. The stipulated order of March 29, 1982, provides that if the judgment is affirmed, "the rights of all parties shall be determined as if the injunctive provisions * * * had been in full force and effect at all times since May 1, 1980 as to CREF and June 1, 1980 as to LIU."

between men and women, but failed to propose a rate schedule satisfactory both to EEOC and the New York State Superintendent of Insurance (*ibid.*). When settlement efforts proved unsuccessful, the court of appeals, in February 1981, ordered a limited remand to the district court to consider petitioners' objections to the relief ordered. Respondent EEOC thereupon moved to intervene as a party plaintiff (Pet. App. 8a-9a, 85a-86a).[6] The district court granted that motion as to the pending relief orders in March 1982, in an opinion that also rejected petitioners' objections to the relief ordered (Pet. App. 95a-96a, 125a-130a). Amended notices of appeal were filed in April 1982 (Pet. App. 9a).

On appeal, the court of appeals held that the use of sex distinct mortality tables violates Title VII (Pet. App. 14a); it agreed with the district court that there is "no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, * * * and the disparate treatment accorded the female TIAA-CREF participants in this case" (Pet. App. 10a). The court affirmed the ruling of the district court that TIAA-CREF are "employers", as defined in Section 701(b) of Title VII (42 U.S.C. 2000e(b)), since in the court of appeals' view that term was intended to "encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' * * * [as] defined at common law" (Pet. App. 14a). TIAA-CREF fell within the Title VII definition of employer, in the

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[6] EEOC also instituted suit against the New York State Superintendent of Insurance, and moved to consolidate that action with this one (Pet. App. 86a). That motion was denied (Pet. App. 96a-98a).

court's view, because TIAA-CREF exist solely for the purpose of enabling employer universities to delegate their responsibilities to provide retirement benefits for their employees, and are "so closely intertwined with those universities" (*ibid.*). The court also found it relevant that participation in the Long Island University plan was mandatory for tenured faculty, and that the university shares in the administrative responsibilities associated with faculty members' participation in the plan (*ibid*).

The court of appeals affirmed the district court's holding that CREF, as a variable annuity company, was not in the business of insurance within the meaning of the McCarran-Ferguson Act. However, it reversed the district court's holding as to TIAA, finding that "the historical context, the legislative history, and judicial interpretations of that history, [establish] that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance' " (Pet. App. 18a). In any event, the court concluded, Section 708 of Title VII explicitly pre-empted state law to the extent it approved of TIAA-CREF's discriminatory system (Pet. App. 19a).

Finally, the court approved and extended to TIAA the district court's grant of injunctive relief precluding CREF from using sex distinct mortality tables in calculating periodic retirement benefits for persons who retire on or after May 1, 1980. It also approved the relief awarded against Long Island University. The court based its approval on, inter alia, the facts

that "[t]he equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds" (Pet. App. 24a); that the alteration in the amount of future benefits will not alter any settled expectations of male participants and will likely reduce the benefits of only 40% of future male retirees by 1% to 8% (Pet. App. 26a & n.12); and that this Court's decision in *Manhart*, as well as other judicial decisions, put TIAA-CREF on notice that their practices with respect to calculating retirement benefits were illegal (Pet. App. 22a-23a).

3. The Sixth Circuit Court of Appeals, on essentially the same facts, has reached a conclusion directly contrary to that of the court below. *Peters* v. *Wayne State University*, 691 F. 2d 235 (1982), petition for cert. pending, No. 82-794.[7] There, the court of appeals rejected, as "clearly erroneous," the district court's conclusion that TIAA-CREF were employers. It relied, *inter alia*, on the fact that "Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity Plan" and that "the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone" (Pet. App. 139a). Citing *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), the court held that Wayne State University had not engaged in sex

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[7] The Wayne State University—TIAA-CREF retirement plan did not mandate employee participation, although employees who decline to participate forfeit the employer contribution. The court of appeals' decision in *Peters* is reproduced at Pet. App. 136a-145a. Further references to that decision will accordingly be to that document.

discrimination by selecting the facially discriminatory plan, because plaintiffs did not demonstrate that the university's "motivation was discriminatory or improper in any way" (Pet. App. 141a). The court distinguished this Court's decision in *Manhart*, *supra*, because *Manhart* involved "*unequal contributions* to an *employer-operated* pension fund" (Pet. App. 143a; emphasis in original). It then held that the use of sex-segregated actuarial tables resulting in unequal benefits was justified because men as a class received a benefit package equal to the package received by women as a class (Pet. App. 140a), and because the plan's payment differences were based upon longevity and not sex (Pet. App. 145a).

4. On October 12, 1982, this Court granted certiorari in *Arizona Governing Committee* v. *Norris*, No. 82-52, which involves a voluntary deferred compensation plan offered to its employees by the State of Arizona, in which employees may select among a variety of payout options available from private organizations the State has selected to participate in the plan. Those options include life annuities offered by a number of these organizations, which all use sex-based mortality tables. Accordingly, the monthly annuities available to female employees are smaller than to males who have deferred the same amount of income. Arizona claims that its plan does not violate Title VII, and also objects to the relief awarded (82-52 Pet.).

ARGUMENT

Petitioners in No. 82-791 correctly contend that the decision below is in direct conflict with that of the Sixth Circuit in *Peters* v. *Wayne State University*, *supra*, and that the questions presented are important ones in which a uniform national rule is appropriate and which accordingly warrant review by this Court.[8]

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[8] We do not, however, agree that the fourth question petitioners in No. 82-791 present warrants plenary review. That question—whether proof of discriminatory intent in the use of sex based mortality tables is necessary to prove a Title VII violation—was not discussed by the court of appeals in this case, and we submit that it is clear that proof of invidious intent is unnecessary where, as here, the employment benefits available to employees are explicitly differentiated on the basis of sex. See *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 712-713. In such circumstances, there is no need, as there was in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and the other cases on which petitioners rely (Pet. 21), to determine whether such differences in treatment are based on gender or on some appropriate business reason. Intentional gender based distinctions, not justified as a bona fide occupational qualification, violate Title VII regardless of the employer's subjective motivation. Remarks of Sen. Humphrey, 110 Cong. Rec. 12724 (1964); Remarks of Sen. Dirksen, 110 Cong. Rec. 8194 (1964); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 996 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971); *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969); *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

1. On the question of liability, we submit that the courts below correctly concluded that the use of sex-segregated actuarial tables to calculate employees' retirement benefits is unlawful under Title VII. In *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, this Court held that a retirement plan that required women to contribute more than similarly situated men, because women as a class live longer than men, violated Section 703(a)(1) of Title VII (42 U.S.C. 2000e-2(a)(1)). The LIU plan at issue here is based on precisely the same rationale and operates in the same manner—on the basis of sex-segregated life expectancy tables—as the plan in *Manhart*. As the court of appeals concluded, there is no meaningful distinction between this plan and the disparate treatment accorded female employees in *Manhart*. Whether a woman contributes a greater amount of her compensation than a man for an equal benefit or contributes an equal amount for a lesser benefit, the use of sex based actuarial tables in calculating periodic benefits results in the same discrimination.

Reliance on "actuarial principles"—specifically, the assertion that "[b]ecause the group of women live more years than similarly situated men * * * lifetime annuity benefits must be paid at a lower periodic rate to the women" (82-791 Pet. 5)—as justification for their disparate treatment was expressly rejected in *Manhart* (435 U.S. at 710, footnotes omitted):

> [T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is

> characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. * * * [W]hen insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers * * *. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.

Last Term, the Court again emphasized that "the principal focus of [Title VII] is the protection of the individual employee" (*Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982), slip op. at 13), and explained *Manhart* as holding that "fairness to the class of women employees as a whole could not justify unfairness to the individual female employee" (*id.* at 14). Petitioners in *Teal* contended that Title VII is not violated, despite a showing that a facially neutral policy has a discriminatory impact on certain employees, if it is also shown that the policy is administered in a way that results in a racially neutral work force (slip op. 12). The Court rejected this "bottom line" defense: because Title VII protects individuals, not groups, it is not satisfied simply by a showing that the challenged policy is fair to the group as a whole (slip op. 13-14). Petitioners here, and the court of appeals in *Peters*, offer the same "bottom line" defense rejected in *Teal*, in an attempt to justify a facially discriminatory policy. But it follows a

fortiori from *Teal* that where the challenged policy is facially discriminatory rather than neutral (in other words, where the case is one of discriminatory treatment rather than discriminatory impact), it cannot be justified by showing that the class as a whole has nevertheless been fairly treated (*Teal* slip op. at 14-15). It is simply irrelevant for Title VII purposes that women as a group receive total annuity benefits equal to men as a group. The violation consists of the payment to each individual woman of smaller monthly benefits than are paid to a similarly situated man. *Teal* teaches that that violation cannot be justified by reliance on the treatment of other members of the victim's class, either individually or as a group.[9]

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[9] TIAA-CREF also assert, without explaining their rationale, that because employee contributions are credited to individual accounts, their plans are outside the scope of *Manhart* (Pet. 15-16 & n.6). The fact that prior to the date of retirement, TIAA and CREF maintain individual accounts for employees participating in their plans does not mean that funds cannot be converted into annuities on a sex-neutral basis, or that *Teal*, and *Manhart's* discussion of group insurance practices, are inapplicable to TIAA and CREF plans. Although contributions paid by or on behalf of employees who have not yet retired, as well as pre-retirement dividends, are credited to individual accounts, at no time before or after retirement can any participant withdraw these funds. Moreover, the record reveals that those individual accounts disappear once an employee retires. At the date of retirement, an employee "settles" his contract with TIAA and CREF and receives a promise of future annuity payments (J.A. 177). Thus, all funds paid by or on behalf of employees as well as all investment earnings attributable to their contributions become part of a common pool that is used for further investment and payment of annuity benefits. Accordingly, retired employees with short lives will subsidize retired employees with longer lives, regardless of the sex of the particular indi-

2. The court of appeals below acknowledged that respondent Spirt "is not an employee of TIAA-CREF in any commonly understood sense" (Pet. App. 14a). But because TIAA and CREF exist "solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees," and participation in their programs is mandatory for tenured faculty members at LIU, the courts below ruled that TIAA and CREF should be viewed as employers within the meaning of Title VII (*ibid.*).[10] In addition, the court of appeals ruled that educational institutions had, in effect, delegated to TIAA and CREF their responsibilities as employers to provide retirement plans (Pet. App. 14a-15a).

The Sixth Circuit in *Peters*, by contrast, ruled that TIAA and CREF were not employers because their responsibility is limited to management of the retirement funds and disbursement of individual annuities

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viduals in either group. *Manhart's* group insurance discussion is therefore, like *Teal*, fully applicable to the TIAA and CREF plans.

[10] The court of appeals adopted the proposition that the term "employer" in Title VII " 'is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an "employer" of an aggrieved individual as that term has generally been defined at common law' " (Pet. App. 14a). That standard could be read to extend Title VII to the admissions policies of educational institutions and the membership policies of private clubs and other institutions clearly not intended to be covered by Title VII. Reliance on the broad proposition is not necessary to the decisions of the courts below. In any event, the statutory definition of the term employer would, in light of the conflict in the circuits, appropriately be an issue for this Court ultimately to resolve.

(Pet. App. 139a). They were not agents of the educational institutions, the Sixth Circuit held, because those educational institutions did not, and could not, control them; the decision to use sex based tables was solely that of TIAA and CREF (*ibid.*). For those reasons, the Sixth Circuit reversed as "clearly erroneous" the district court's holding that they were employers (*ibid.*).

More than 400,000 employees of approximately 2800 colleges and universities participate in the TIAA-CREF system (Pet. App. 3a). Although the conflict between the Sixth Circuit and the Second Circuit as to whether TIAA and CREF should be considered employers or agents of employers within the meaning of Title VII is in part based upon facts peculiar to TIAA and CREF, the conflict between the circuits affects the rights and liabilities of the many employees of educational institutions, and it is sufficiently important to warrant review by this Court.

The issue of whether TIAA and CREF are employers covered by Title VII, however, is concededly separate from the question of liability, because in this case the educational institution (Long Island University) is a party to the suit and a petitioner in this Court (No. 82-913), and can be held liable for any violation of Title VII. TIAA and CREF are properly before the courts as parties necessary for relief under Rule 19, Fed. R. Civ. P., even if they are not employers. If liability under Title VII is sustained, however, the question whether TIAA and CREF are employers or agents of employers within the meaning of Title VII is significant in determining the rights and obligations of the parties, as to matters of monetary liability and liability for attorney's fees, and may also be of practical significance in fashioning prospective relief.

3. If TIAA and CREF are employers within the meaning of Title VII, there remains the question whether the McCarran-Ferguson Act is a "defense" to any Title VII liability which might otherwise be imposed. There is no conflict between the circuits on this question, and standing alone the issue might not warrant review by this Court in the absence of a conflict. TIAA and CREF have raised the issue in their petition, however. If the Court agrees that the conflict in the circuits on the other questions presented warrants review, it may wish to grant review on this issue as well, in order to resolve the whole controversy here.

4. There remains the question whether the relief ordered in this case was appropriate. This Court recognized in *Manhart*, *supra*, 435 U.S. at 721, the special problems inherent in formulating appropriate relief in this area because of the "potential impact which changes in rules affecting insurance and pension plans may have on the economy * * * [by creating] major unforeseen contingencies [that] jeopardize[] the insurer's solvency and, ultimately, the insureds' benefits." These very concerns—the need to insure financial integrity of retirement systems and the desire to protect the interests of employees and their beneficiaries—led to the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, which requires covered plans to conform to specified minimum standards.[11] Both the statutory

[11] Title I of ERISA applies generally to pension plans established or maintained by employers or unions engaged in or affecting interstate commerce (29 U.S.C. 1003(a)). Title II of ERISA, and subchapter D of chapter 1 of the Internal Revenue Code (26 U.S.C. (& Supp. V) 401-415), contain standards to qualify pension, profit-sharing and stock bonus

language of ERISA and its legislative history demonstrates that Title VII applies to ERISA plans.[12]

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plans for favorable tax treatment. Those standards are substantially identical to the ones in Title I.

The plan involved in *Norris* is a "governmental plan" exempt from coverage under Title I of ERISA. See Section 4(b)(1), 29 U.S.C. 1003(b)(1); Section 3(32), 29 U.S.C. 1002(32). Title II is also inapplicable to such plans because their tax status is generally governed by either Section 457 of the Internal Revenue Code (26 U.S.C. (Supp. V)) or by the provisions of that Code that were in effect before the passage of ERISA (26 U.S.C. 410(c)(2), 411(e)(2)).

While the question was not developed in the courts below, the plan involved in this case appears to be a "pension plan" for purposes of Title I, but not for Title II, of ERISA. This case involves retirement income arrangements sometimes referred to as "tax-sheltered annuities" or "section 403(b) annuities." These are annuity contracts purchased by employers for individuals who work for either public schools (including colleges and universities) or certain tax-exempt organizations. Within limits, the amounts contributed by the employer for such contracts are not taxable to the employee. Such arrangements are not subject to the requirements applicable to "qualified" pension, profit-sharing, and stock bonus plans under Section 401(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). Since there is no trust corpus, there is no "plan" within the meaning of the Code. However, such an arrangement is considered a "pension plan" for purposes of Title I of ERISA if it is maintained by an employer, an employee organization or both (and is not otherwise excluded from coverage). A Department of Labor regulation (29 C.F.R. 2510.3-2(f)) states that certain tax-sheltered annuity arrangements are not maintained by an employer if all of a fairly lengthy list of requirements are satisfied, including the requirement that participation be completely voluntary (the LIU plan, by contrast, is mandatory for tenured faculty members).

[12] Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that nothing in ERISA "shall be construed to alter, amend,

In reconciling the policies and requirements of ERISA and the concerns noted in *Manhart* with the need to provide effective relief for Title VII violations, four principal remedial approaches are conceivable: (1) an order that the benefits of future retirees be calculated from sex-neutral actuarial tables; (2) an order that the benefit level of the disfavored class be raised to that of the favored class ("topping up"); (3) a hybrid order, requiring the use of sex-neutral tables to calculate benefits attributable to future contributions, and "topping up" for benefits attributable to past contributions; and (4) an order requiring the use of sex-neutral tables only for benefits accruing after the date of the order.[13]

The relief awarded in this case against petitioner LIU appears to be a variant of category (4) above—the least extensive of the four categories of relief. There is, accordingly, no substantial basis for contending that it was excessive, and indeed petitioner LIU makes no such contention. If this Court con-

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modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law."

In both the Senate and the House there was discussion of amending ERISA to include a provision prohibiting sex-based discrimination in pensions. The proponents of the amendments agreed on the floor not to offer them because both Senator Williams and Representative Dent (the floor managers) gave express assurances that Title VII already prohibited discrimination in pension benefits, citing previously decided Title VII cases. 119 Cong. Rec. 30409-30410 (1973); 120 Cong. Rec. 4726 (1974). The fact that Congress determined that Title VII applies to ERISA plans, however, does not suggest that Title VII relief may not be fashioned taking into account ERISA concerns.

[13] The options involving "topping up" could have a significant financial impact on pension plans.

cludes that it was also proper to award relief against TIAA or CREF (see pages 16-18, *supra*), it will be necessary as well to consider the propriety of the relief ordered against them (a somewhat more extensive form of relief than that awarded against LIU).[14]

CONCLUSION

Two issues presented by this case—the applicability of Title VII to sex-based actuarial tables and the question whether TIAA-CREF are employers covered by that Title—are worthy of review by this Court. *Norris* raises the liability issue (in a somewhat different context), but not the employer issue. For that reason the Court may wish to hold this case until *Norris* has been decided and then, to the extent necessary, grant certiorari in this case to decide the remaining issues not disposed of in *Norris*.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

MICHAEL N. MARTINEZ
Deputy General Counsel
Equal Employment Opportunity Commission

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor

JANUARY 1983

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[14] The EEOC, which supported the relief awarded against TIAA-CREF in the courts below, adheres to the position that that relief was proper under Title VII.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-791

TEACHERS INSURANCE AND ANNUITY ASSOCIATION and
COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

v.

DIANA L. SPIRT et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

RESPONSE OF RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS TO PETITIONERS' MOTION FOR EXPEDITED CONSIDERATION OF THE PETITION FOR CERTIORARI

Respondent American Association of University Professors ("AAUP") does not object to so much of the motion as requests an abbreviated time for responding to the petition for certiorari.

The AAUP, which received one service copy of the petition, appendix and motion on November 9, does not need the full thirty-day period allowed under Rule 22.1 for the preparation of a brief in

opposition. The AAUP can and will have its brief filed by Tuesday, November 23. The AAUP respectfully suggests, therefore, that that portion of the petitioners' motion relating to the expedited filing of briefs in opposition be granted, and that November 23 be established as the filing deadline for that purpose.

The AAUP opposes that portion of the motion that calls for this case to be set down for argument on the same date as Arizona Governing Committee v. Norris,[1] if the petition in this case be granted. As the motion itself shows, Norris is predicated on facts and raises legal issues that differ substantially from those presented in this case and in Peters v. Wayne State University.[2] The petitioners correctly state in their motion that "[t]he focus in Norris is quite different from that in Spirt and Peters."[3] That being undisputed, the AAUP respectfully contends that there is no reason why the latter two cases should be heard in conjunction with Norris. There is also no reason why the matter should be addressed until the Court is prepared to act on the petitions for certiorari in this case and Peters.

In sum: the AAUP has no objection to an expedited briefing schedule on the petition in this case, under which briefs in opposition would be due by November 23. The AAUP believes, in fact,

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[1] No. 82-52, petition for cert. granted, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982).

[2] No. 82- ____, petition for cert. filed November 10, 1982.

[3] Motion at 4. The differences are described in two long paragraphs on pages 3 and 4 of the motion.

that there are good reasons for expedition in light of the probable acceleration of the briefing schedule in Peters. Peters is so closely related to this case that it makes practical sense to brief and consider the two cases in tandem. This, however, is because of the relationship of the two cases to each other, not because of their relationship to Norris. There is no reason why all three cases should be heard together.

Respectfully submitted,

Lawrence White

Lawrence White
American Association of
University Professors
One Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel of Record for Respondent
American Association of University
Professors

November 10, 1982

CERTIFICATE OF SERVICE

In accordance with Rule 28 of the Rules of this Court, I hereby certify that on November 10, 1982, one copy of the foregoing "Response of Respondent American Association of University Professors to Petitioners' Motion for Expedited Consideration of the Petition for Certiorari" was served on counsel for each party required to be served, as follows:

By hand delivery, to the office of Rogers & Wells, 1737 H Street, N.W., Washington, D. C. 20006.

By first-class mail, postage prepaid, to:

James W. Paul, Esq.
Rogers & Wells
200 Park Avenue
New York, New York 10166
Counsel for the Petitioners

Kenneth D. Wallace, Esq.
Two Landmark Square
Stamford, Connecticut 06901
Counsel for Respondents
Diana Spirt et al.

Judith E. Tytel, Esq.
General Counsel
Long Island University
Greenvale, New York 11548
Counsel for Long Island University

Philip Sklover, Esq.
Eaual Employment Opportunity Commission
Washington, D.C. 20506
Counsel for Respondent EEOC

and

Erwin N. Griswold, Esq.
Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
Washington, D.C. 20006
Counsel for the American Council
of Life Insurance

Lawrence White

Lawrence White
A Member of the Bar of this Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and
COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Amicus

Of Counsel

LINWOOD HOLTON
General Counsel
JACK H. BLAINE
Chief Counsel
EDWARD J. ZIMMERMAN
Assistant General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4000

QUESTIONS PRESENTED

The Second Circuit, in the decision below, found that Long Island University ("LIU") and the petitioners, independent insurers which provide annuity contracts to LIU employees, violated Title VII because benefits under the annuity contracts are calculated by using sex-specific mortality tables which result in female employees receiving smaller monthly annuity payments than similarly situated males. This decision is in direct conflict with the subsequent decision of the Sixth Circuit in *Peters v. Wayne State University*, Nos. 79-1658, -1670, -1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed, (No. 82-794)*. Some of the issues raised in this case are related to those presented in *Norris v. Arizona Governing Committee*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (No. 82-52), which is currently pending before this Court.

The questions presented in this case, which are not presented in *Norris*, include:

(1) Whether Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) applies to third-party insurers who do not have an employer-employee relationship with the plaintiff-employee.

(2) Whether the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.*) precludes applying Title VII to the insurance activities involved herein.

(3) Whether the lower courts granted impermissible retroactive relief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-791

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and
COLLEGE RETIREMENT EQUITIES FUND,
Petitioners,

v.

DIANA L. SPIRT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of the petition for certiorari. Consent from counsel for all parties has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") represents the interests of 555 member life insurance companies, including most of the major life insurers in the United States. Its members currently hold more than ninety-five percent of the life insurance in force in legal reserve life

insurance companies in the United States. In addition, member companies account for ninety-nine percent of the insured private pension plan business in the United States. Thus, the Council has a direct and immediate interest in insurance practices, in general, and in the sound administration of pension plans, in particular.

The pension industry is large and affects many individuals. At the end of 1980, 26.1 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. See American Council of Life Insurance, 1981 Pension Facts. Assets backing these plans reached $165.8 billion, an increase of 19 percent over the immediately preceding year. *Id.*

Virtually all insurance companies, including members of the Council, have historically classified risks according to sex in calculating benefits under defined contribution plans, to account for the well recognized fact that, as a class, women live longer than men. Therefore, the decision below prohibiting the use of sex-specific tables will directly affect the current and future business operations not only of the petitioners (TIAA-CREF), but of all insurance companies. Indeed, such a judicially forced break with the past will revolutionize the insurance industry.

The Council is concerned about the continued viability of employee retirement plans. An internal study conducted by the Council estimates that a prohibition against using sex-specific actuarial tables could increase the costs of retirement plans by as much as two billion dollars per year. The Superintendent of Insurance of New York has estimated that a total of $1.9-$2.1 billion would be needed to equalize the results of using sex-specific tables in New York funded pensions plans after the date of this Court's decision in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, enough possibly to bankrupt the system. Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Governments?*, 7 Employee Benefits Journal 8, 13 (1982).

In any aspect of insurance, accurate risk classification is essential to maintaining the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events such

as death or disability which are unpredictable on an individual basis. No aspect of insurance, including pensions, can proceed entirely on an "individual" basis, since the essence of insurance is the sharing of risks among a group. An individual's sex, like age, provides an objective statistical basis for accurately assessing various risks presented by that individual. There is, indeed, no more reason for excluding sex as a basis for calculating risk then there is for excluding age—or, to put it another way, the use of age in calculating pension benefits is no more "individual" than the use of sex.

As a result of several lower court decisions, including the decision below, the insurance industry's traditional and historically-accepted practice of using sex-specific mortality tables has been cast into doubt. Because of its concern that employee retirement plans continue to be administered on the basis of sound actuarial principles, the Council has a direct and immediate interest in the questions presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported; it is reproduced in the Appendix to the Petition. The United States District Court for the Southern District of New York issued five opinions in this case: (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (reported at 93 F.R.D. 627). They are set forth in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on September 29, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

The McCarran-Ferguson Act provides, in relevant part:

> [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(b).

STATEMENT

Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") provide insurance products (principally annuities) through retirement plans which cover faculty and staff members in 85% of all private four-year colleges and universities and in over 40% of all public colleges and universities in the United States. More than 700,000 employees at over 3,400 institutions participate in the TIAA-CREF system.

TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. TIAA provides annuities

especially designed for employees of academic institutions. CREF, a companion organization, was created in 1952 by a special act of the New York State Legislature in order to allow investment of pension funds in financial instruments other than those traditionally permissible for annuity funds like TIAA. Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law.

Respondent, Diana L. Spirt, is a tenured professor at Long Island University ("LIU"). LIU has adopted a TIAA-CREF administered retirement plan, in which respondent is required to participate. Under the plan, the employee contributes 5% of his or her yearly salary. In addition, LIU contributes 5% of the first $4,800 of an employee's salary and 11% of an employee's earnings in excess of that amount. Thus, contributions by and on behalf of similarly situated male and female employees are equal in amount.

Each contribution received by TIAA-CREF purchases retirement benefits pursuant to separate annuity contracts between TIAA-CREF and each individual participant. (The educational institution is not a party to the annuity contract.) The contract rights vest immediately and irrevocably in the individual employee. All annuity accumulations are "portable," i.e., the employee retains his or her ownership interest in the individual account whenever he or she transfers employment, in or out of higher education.

At retirement, an employee may select from among several annuity payment options.[1] If a "single life option" is selected,

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[1] The Second Circuit described the available options (Pet. App. 5a n.1):

> Although it is assumed that most TIAA-CREF participants will receive their retirement benefits on a monthly basis, an annuitant may choose to receive annuity payments quarterly, semi-annually, or annually, rather than monthly .... Also, rather than simply receiving benefit payments for the duration of one's own life (a single life annuity), a retiree can opt for a life annuity with a ten or twenty year guaranteed period, or for a joint-life option, under which benefits will continue throughout the lives of both the retiree and a named beneficiary.

the employee will receive a specified amount on a monthly basis for life.[2] In order to price their product accurately, and to ensure their continued solvency, TIAA and CREF use sex-specific mortality tables in calculating the amount of the monthly benefits. As a consequence, female participants receive smaller monthly payments than similarly situated male retirees, reflecting the fact that women live longer than men. The actuarial values of the annuity plans are identical for men and women.

Proceedings Below

Respondent, Diana L. Spirt, initiated this action against TIAA and CREF on April 15, 1974, alleging that the use of sex-specific mortality tables violated Title VII (42 U.S.C. § 2000e *et seq.*), The Equal Pay Act (29 U.S.C. § 206(d)), and the Fourteenth Amendment. On July 1, 1976, the district court

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[2] The court of appeals described the process by which the monthly payment is calculated (Pet. App. 4a-5a):

> After retirement, TIAA provides a life-long fixed dollar annuity, which pays the retired plan participant a specified and definite amount of benefit on a monthly basis. CREF, on the other hand, provides its annuitants with a variable annuity. Under this plan the annuitant receives a periodic payment, the amount of which reflects the results of CREF's investment policies. Plan participants may allocate their contributions between TIAA and CREF in whatever proportions they choose, and under certain conditions, they may transfer contributions from one system to the other. Upon an employee's retirement, both the amount of the fixed benefit to be received monthly from TIAA and the amount of CREF units to be used in determining the amount of benefits to which an employee will be entitled each year under the CREF variable-annuity program are calculated, and the retiree's contract with TIAA-CREF is "settled."

Under this system (Pet. App. 5a n.2),

> a retiree has no right to receive a lump sum payment for the full value of contributions paid into the fund. However, upon retirement a participant may choose to receive up to 10% of accumulated contributions for use in dealing with transitional costs. Receipt of such a payment results, of course, in a corresponding decrease in the amount of moneys available for annuity payments.

resolved certain jurisdictional and procedural issues; this resulted, *inter alia*, in LIU being joined as a party under Fed. R. Civ. P. 19(a). *Spirt v. Teachers Insurance and Annuity Association*, 416 F. Supp. 1019 (S.D.N.Y. 1976).

After entering into a stipulation of facts, the parties filed cross motions for summary judgment. Although the district judge granted TIAA's summary judgment motion on the ground that it was not subject to Title VII because of the McCarran-Ferguson Act, the court granted respondent's motion for summary judgment as to CREF and LIU on the Title VII issue. *Spirt v. Teachers Insurance and Annuity Association*, 475 F.Supp. 1298 (S.D.N.Y. 1979).

The district court found that (1) TIAA's use of sex-specific mortality tables fell squarely within the "business of insurance" as defined by this Court in *SEC v. National Securities, Inc.*, 393 U.S. 453, (2) Title VII did not "specifically relate to the business of insurance," and (3) "application of Title VII to TIAA in the instant case would invalidate, impair, or supersede New York law regulating the business of insurance." *Spirt*, 475 F. Supp. at 1304. The district court, however, relying on *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, held that the McCarran-Ferguson Act did not shield CREF from the constraints of Title VII because the variable annuities offered by CREF lacked any investment risk-taking, and thus, according to the court, did not constitute the "business of insurance."

On the Title VII issue, the court held that CREF was an "employer" within the meaning of § 703(a), and that, therefore, CREF would be liable, along with LIU, for any violation of the Act. *Spirt*, 475 F. Supp. at 1308. Then, the district court applied the broad principles of *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, without recognizing the qualifications stated in that case, and concluded that, because the use of sex-specific mortality tables resulted in women receiving smaller monthly annuity payments, both LIU and CREF had discriminated against women in violation of Title VII. *Spirt*, 475 F. Supp. at 1307.

In fashioning its decree, the district court granted what it characterized as purely prospective relief. *Spirt*, 475 F. Supp.

at 1315. The court enjoined CREF from using sex-specific mortality tables in calculating annuity benefits for all participants retiring on or after May 1, 1980 (thus subjecting accumulations made over many prior years to the new rules), and enjoined LIU from making contributions on behalf of its employees and from requiring its employees to contribute to any retirement plan which continued to use sex-specific mortality tables in calculating periodic payments after June 1, 1980. 475 F.Supp. at 1316.[3]

All of the parties took appeals to the Second Circuit. The court of appeals then granted the parties' request for a limited remand to the district court for consideration of TIAA-CREF's "good faith reliance" defense to the imposition of retroactive relief and to permit respondent to join Albert B. Lewis, the New York State Superintendent of Insurance, as a party to the *Spirt* action. After further motions and the filing of the supplemental complaint against Superintendent Lewis, the district court filed another opinion. *Spirt v. Teachers Insurance and Annuity Association*, 93 F.R.D. 627 (S.D.N.Y. 1982). The district court, *inter alia*, rejected TIAA-CREF's good faith reliance defense and granted a motion to dismiss the respondent's supplemental complaint against Superintendent Lewis.

On appeal, the Second Circuit affirmed in part, reversed in part, and remanded. The court of appeals, after concluding that both TIAA and CREF were "employers," affirmed the district court's finding that the use of sex-specific mortality tables violated Title VII. The court reversed the district court's finding that TIAA was exempt from compliance with Title VII by virtue of the McCarran-Ferguson Act. On the relief issue, the court of appeals affirmed the district court's order and extended its application to TIAA.

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[3] On February 13, 1982, the EEOC filed a complaint against Superintendent Lewis in the United States District Court for the Southern District of New York. *Equal Employment Opportunity Commission v. Lewis*, 81 Civ. 881 (RJW). (See description of the *Lewis* litigation in *Spirt v. Teachers Insurance and Annuity Association*, 93 F.R.D. 627, 633 (S.D.N.Y. 1982)). In the *Lewis* action, the EEOC seeks to enjoin Superintendent Lewis from applying New York Insurance Law in a manner that the EEOC contends is inconsistent with the Fourteenth Amendment, Title VII, and the Equal Pay Act.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Direct Conflict with the Decision of the Sixth Circuit in *Peters v. Wayne State University.*

A little over two weeks after the Second Circuit's decision in this case, the Sixth Circuit, in a case likewise involving a TIAA-CREF administered retirement plan, held that Title VII does not prohibit an insurance company from operating, or an employer from selecting, a retirement plan under which the size of monthly annuity payments is calculated from sex-specific mortality tables. *Peters v. Wayne State University,* Nos. 79-1658, -1670, -1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed* (No. 82-794). The Sixth Circuit found that the district court's characterization of TIAA-CREF as an "employer" for purposes of Title VII was clearly erroneous. The court stated:

> Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

(Pet. App. 139a.)

The Sixth Circuit then considered whether Wayne State had violated Title VII by choosing TIAA-CREF's plan for its employees. Although it asserted that Wayne State would have been liable if the retirement plan had discriminated against women, the court held: "the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men." (Pet. App. 140a.) Noting that Title VII requires a showing of intentional discrimination in a disparate treatment case, the court found that the plaintiffs "had not demonstrate[d] at trial that Wayne State's motivation was discriminatory or improper in any way." (Pet. App. 141a.) In addition, the court found that Wayne State had not violated

Title VII under a disparate impact analysis. There was no discriminatory effect because "[t]he retirement plan is not worth more to men than to women." (Pet. App. 144a.)

The Sixth Circuit's decision in *Peters* is in direct conflict with the Second Circuit's decision in *Spirt*. As a consequence, TIAA and CREF are subject to conflicting federal court of appeals decisions. In addition, these decisions directly affect all other insurance companies engaged in writing retirement annuities, and have thus contributed to the confusion and uncertainty which exists in the entire insurance industry as to the legality of using sex-specific mortality tables for these policies.

II. The Questions Presented by the Decision Below Will Not Be Resolved in *Norris*.

On October 12, 1982, this Court granted a petition for a writ of certiorari in *Arizona Governing Committee v. Norris* (No. 82-52). In *Norris*, this Court will be faced with a variety of issues arising from the insurance industry's practice of using sex-specific mortality tables.

In *Norris*, the Ninth Circuit relied on this Court's decision in *Manhart* in finding that the State of Arizona, in establishing a voluntary deferred compensation plan, violated Title VII by contracting with private, independent insurance companies which use sex-specific actuarial tables. The petition for a writ of certiorari in *Norris* raises a number of questions, most of which involve the scope of this Court's holding in *Manhart*. The questions presented include: (1) whether Title VII is violated when an employee savings plan which is entirely voluntary makes available to women an annuity option of equal actuarial value to that offered men if the annuity plan results in smaller periodic payments to women, (2) the scope of *Manhart's* open market exception, (3) whether *Manhart* should be broadly construed to impose liability on an employer for the practices of independent insurance companies, and (4) whether, in a

disparate treatment case, an employer can violate Title VII despite a specific finding that there was no intent to discriminate.

Norris does not, however, present several issues of great significance to the insurance industry which are presented by *Spirt*. Because no insurance companies were parties in *Norris*, that case will not resolve one of the questions on which the Second and Sixth Circuits directly conflict, i.e., whether an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer. Also, *Norris* will not answer the McCarran-Ferguson Act question which is so graphically presented by *Spirt*. And this issue—whether Title VII, which does not specifically mention insurance, applies to the insurance practices in question—is of profound importance. The fact that the Superintendent of Insurance of the State of New York was made a defendant in *Spirt* illustrates the risk that the application of Title VII to the practices in question will impair the states' traditional authority to regulate the "business of insurance."

It is apparent that *Norris* will not resolve issues that are of fundamental importance to the insurance industry. It is, therefore, highly desirable for this Court to provide guidance on the additional questions raised by this case, i.e., (1) whether an independent insurance company risks Title VII liability when it offers annuity plans which use sex-specific mortality tables to employees of Title VII employers, (2) whether, despite the McCarran-Ferguson Act, an insurance company which administers programs approved by a state insurance commission risks liability under Title VII or other federal statutes which do not specifically relate to insurance, and (3) whether the relief granted by the court below is impermissibly retroactive, contrary to this Court's direction in *Manhart*.

In order that these questions may be resolved, this Court should grant the petition and set the case for argument on the same day as *Norris*. Otherwise, the uncertainties which now exist not only for TIAA-CREF but for other companies throughout the insurance industry will persist to the detriment of the companies and their policyholders.

III. The Questions Presented by the Decision Below Are of Substantial Public Importance.

A. By Extending Title VII to Third-Party Insurers, the Decision Below Has Greatly Expanded the Scope of *Manhart* and Threatened to Revolutionize the Insurance Industry.

As this Court has recognized by granting certiorari in *Norris*, the questions presented by the insurance industry's traditional practice of using sex-specific mortality tables are of substantial public importance. This brief will not repeat the arguments made in the *Norris* petition or in the Council's Amicus Brief in support of that petition which explain the importance of the issues presented in *Norris*.[4] It must be emphasized, however, that the issues raised by the decision below which are *not* presented in *Norris* are also of critical importance to the insurance and pension industries and to the individuals who participate in retirement plans.

Since this Court's decision in *Manhart*, the lower federal courts have struggled with its implications in a wide variety of contexts. As the First Circuit has noted: "Whether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139, 1143 (1st Cir. 1978). Recognizing that *Manhart* had potentially far-reaching implications, this Court, in carefully limiting the scope of its holding, stated: "we do not suggest that ... [Title VII] was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." *Manhart*, 435 U.S. at 717. Since *Manhart*, the lower

[4] It is possible that *Norris*, if it is decided on one of the "threshold" questions it presents, will not resolve the fundamental question at stake in many of the post-*Manhart* cases, i.e., whether the use of sex-specific mortality tables in calculating monthly annuity payments constitutes discrimination which violates Title VII. It is of great importance to the insurance and pension industries that this Title VII issue be decided. Granting the petition in this case will make it more likely that this issue will be addressed.

federal courts have been faced with issues which do threaten to revolutionize the insurance industry. The *Norris* case currently before this Court will resolve some of these problems. Other issues which are squarely presented by the decision below will, however, remain undecided.

As this Court stated in *Manhart*: "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Manhart*, 435 U.S. at 718 n.33. The decision below, however, held that TIAA and CREF were subject to Title VII. In *Peters*, the Sixth Circuit, after stating that the district court's characterization of TIAA and CREF as "employers" was clearly erroneous, "decline[d] to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer." (Pet. App. 139a.) The Second Circuit's contrary holding would, without question, revolutionize the pension and insurance industries. This conflict will not be resolved in *Norris*. The need for this Court's consideration of the issue could not be more clear.

B. The Decision Below Raises an Important Issue Concerning the Rights of the States, under the McCarran-Ferguson Act, to Regulate the "Business of Insurance" Free from Federal Interference.

The McCarran-Ferguson Act provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(b). This Act was intended to preserve the states' traditional authority to regulate the insurance business. In the absence of a clear expression of congressional intent, state regulation of the insurance business should not be impaired. As this Court has stated:

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for

> regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from [congressional] power, *whether dormant or exercised,* except as otherwise expressly provided in the Act itself or in future legislation.

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429-30 (footnote omitted; emphasis added).

The court of appeals, by giving an unduly narrow reading to the McCarran-Ferguson exemption, has disrupted the federal-state balance which the Act establishes, and has substantially eroded the states' traditional authority to regulate the insurance business.

In fact, the court of appeals' approach to the McCarran-Ferguson Act question stands the statute on its head. The court stated:

> We find, based on the historical context, the legislative history, and judicial interpretations of that history, that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as "the business of insurance."

(Pet. App. 18a.) In addition, the court relied on the important federal policy articulated by Title VII and Title VII's general preemption provision to support overriding the McCarran-Ferguson Act exemption.

There is, however, nothing in the case law which requires a finding that Congress, at the time it passed McCarran-Ferguson, specifically intended to displace a *subsequently* enacted federal statute that impairs a state's regulation of insurance. On the contrary, the Act, on its face, establishes that the conflicting federal statute will not displace the state regulatory scheme unless it "specifically relates to the business of

insurance." Likewise, no balancing of interests is required. The McCarran-Ferguson Act also expresses important policies, and its language, rather than a federal court's resolution of a perceived clash of interests, should control.

A general preemption provision fails to satisfy the statutory requirement that a conflicting federal statute "*specifically* relate to the business of insurance." There is no specific mention of insurance in the Civil Rights Act of 1964 or in any of the related statutes. A court's desire to effectuate what it perceives as a paramount federal interest cannot justify a reordering of the federal-state balance which the McCarran-Ferguson Act is intended to protect. As the district court in this case recognized, the application of Title VII to a long-standing insurance practice, i.e., the use of sex-specific actuarial tables, threatens to "invalidate, impair, or supersede . . . [state] law regulating the business of insurance." 475 F. Supp. at 1304.

Under the Second Circuit's view of the McCarran-Ferguson Act, the "business of insurance" would potentially be subject to a wide range of federal legislation. This Court should grant the petition to prevent federal interference with the states' traditional authority to regulate the insurance industry.

CONCLUSION

The questions presented in this case are of substantial public importance. There is a direct conflict between this case and the Sixth Circuit's decision in *Peters*, and this case provides a means for the consideration of a full range of issues related to those involved in *Norris*, in which this Court has already granted certiorari.

The petition for a writ of certiorari should be granted, and the case assigned for argument on the same day as argument is heard in *Norris*.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Counsel for the Amicus

Of Counsel

LINWOOD HOLTON
General Counsel
JACK H. BLAINE
Chief Counsel
EDWARD J. ZIMMERMAN
Assistant General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4000

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